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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 329.

COUNT JOSEPH TELFENER,
Plaintiff in Error,

vs.

GEORGE W. RUSS,
Defendant in Error.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

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Brief for Plaintiff in Error.

I.

In 1879 the Legislature of Texas passed a law entitled: "An Act to provide for the sale of a portion of the public lands, &c." The sections bearing on this case are as follows:

"SECTION 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desires to purchase, to be surveyed by the

authorized public surveyor of the county or district in which said land is situated.

"SECTION 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and, within sixty days after said survey, to certify and record a map and field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the General Land Office, as required by law in the other cases. * * *

"SECTION 5. Within sixty days after the return to and filing in the General Land Office of the surveyor's certificate, map and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the Commissioner of the General Land Office of the receipt of the State Treasurer for such purchase money, said Commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so conveyed and paid for.

"SECTION 7. It shall be the duty of the Commissioner of the General Land Office to give such general and specific instructions to the surveyors in relation to the survey of the public lands under the provisions of this act as may best subserve all interests of this State and carry into force and effect the intent and purposes of this act.

"SECTION 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

"SECTION 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same

at the rate of fifty cents per acre within the time prescribed in Section 5 of this act, he shall forfeit all rights thereto and shall not thereafter be allowed to purchase the same ,but the land so surveyed may be sold by the Commissioner of the General Land Office to any other person, firm or corporation who shall pay into the treasury the purchase money therefor."

This act was amended in 1881 by extending its provisions to other counties.

On the 22d of January, 1883, both acts were repealed.

While the first two acts mentioned were in force, it is claimed by the defendant in error (as in his petition filed herein, page 1) that he entered into a contract with the plaintiff in error on the 1st day of November, 1892, not personally, but with one claiming to be the agent of the plaintiff in error, by which the defendant in error sold and the plaintiff in error purchased the right that the defendant in error claimed to have to about one million acres of land, agreeing to give therefor twenty-five cents an acre.

II.

The contract claimed (p. 8), briefly stated, is as follows:

"WHEREAS, said Russ (defendant in error) claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso County, Texas, from the State of Texas, under and by virtue of an Act of the Legislature of Texas, approved July 14th, 1879, providing for the sale of a por-

tion of the public lands of Texas at fifty cents per acre, said application having been made in October, 1882, and duly filed in the Surveyor's Office in El Paso County; and

"WHEREAS, said Count Telfener (plaintiff in error) is desirous of purchasing from the said Russ all his rights, title and interest under and by reason of such application:"

In consideration of the transfer of all such rights as the defendants in error had by reason of such application, the plaintiff in error agreed to give to the defendant in error twenty-five cents per acre for each and every acre of land covered by his said application.

It was agreed in the contract that ninety per cent. of the said twenty-five cents should be paid (the application having been found to be good and regular) on the 15th day of said November, and that thereupon the defendent in error would execute and deliver to the plaintiff in error any and all deed or deeds or other instruments that might be proper or necessary to convey, transfer and assign to the plaintiff in error, all and singular, the rights, title and interest that defendant in error then had or might be entitled to in and to said lands by reason of such applications and files.

It was also further agreed that on the completion of the surveys and field notes the residue should be paid.

By a supplemental contract (p. 10), made the same day, between the same parties, it was agreed that the defendant in error should have this land surveyed and be paid by the plaintiff in error five cents an acre for such survey—three cents per acre to be paid when the survey and field notes should be completed, one cent when the field notes should be filed in the Land Office and one cent when the patents should issue.

It was, however, in said supplemental contract provided as follows:

"Now, therefore, it is agreed by the said Russ (defendant in error) that if the sale and transfer shall be made under the said contract as aforesaid, he will, at his own proper cost and expense, make the survey, field notes and maps of said lands, and file them in the office of the Surveyor of El Paso County and in the General Land Office of the State, at Austin, in the manner and within the time required by the provisions of the law; and that he will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office, &c."

The petition of defendant in error sets out that the contract was not complied with; that he complied upon his part, but that the plaintiff failed in every particular.

III.

The plaintiff in error answered the petition, denying that the facts set out were sufficient in law and also that the said C. Baccarisse, claiming to be the agent of plaintiff in error, was not authorized to make any such contract, but was merely employed to ascertain whether options or additional contracts could be obtained subject to approval by an expert; not, however, to be binding unless ratified by the plaintiff in error after a report had been made by an expert, and that the plaintiff in error did not know, until a short time before the suit was instituted, that the said Baccarisse had attempted to execute any contract, such as is set up in

the petition, and that for the reason that he supposed any contract made was to be subject to his ratification; and, further, that the plaintiff in error had never ratified the alleged contract.

On the issues made there was a trial and a verdict for the defendant in error for the sum of $384,409 (p. 29).

IV.

The First Question.

THE FIRST QUESTION THAT ARISES IS AS TO WHETHER THE DEFENDANT IN ERROR HAD ANY INTEREST THAT COULD BE SOLD AND ASSIGNED IN THE LANDS MENTIONED IN THE CONTRACT.

It certainly was the intention of the Legislature to sell the land, and also that the surveys should be made for *bona fide* purchasers. Care was taken to prevent speculators from holding the land for private gain at the expense of the State, so a time was fixed in which the purchase must be consummated. After the application the land must be surveyed in a certain time. After the survey the maps and field notes must be filed in the proper offices within sixty days, and then the person, firm or corporation that had made application for the survey must within sixty days pay into the treasury of the State the fifty cents per acre. If the money were not thus paid within the time prescribed, then it was provided by Section 9 that the person, firm or corporation applying for the survey should for

feit all rights, and, as a penalty, should not thereafter be allowed to purchase the land; all of which shows that the object of the Legislature was to sell the land, and not to give speculators an opportunity to hold it out of the market to the injury of the State, simply for the purpose of seeing whether or not money could be realized on a resale.

It will also be observed that nothing is said in the act about giving the right to the assignees of any person, firm or corporation. The right of purchase is given to the person, firm or corporation who makes application for the survey, and not to any other person. In other words, the one who applies for the survey must be the purchaser, and if he fail or neglect to comply with the law, he is to be prevented from purchasing at all.

According to the words of the contract, the defendant in error did not claim to be the owner of any of this land, but did claim that he had "made application in due form for the purchase of about one million acres of land, more or less, in El Paso County, Texas, from the State of Texas, under and by virtue of an an Act of the Legislature of Texas, approved July 14th, 1879."

This, of course, could amount to no more than a compliance with Section 2 of this act, which is as follows:

"That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the contract or contracts which such person, firm or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which the land is situated."

He could not under the law have made any applica-

tion to purchase. All he could have done was to cause "the contract or contracts which such person, firm or corporation desired to purchase to be surveyed;" and until he had caused the land to be surveyed and until the survey had been made and the map and field notes of the survey had been properly filed in the county where the land was situated and in the General Land Office, and within the time limited by law, the defendant in error had no right and could obtain no right to purchase.

So that, as a matter of fact, at the time the contract was made, viz., on the first of November, 1882, the defendant in error had acquired no right to purchase other than, or different from, any and every other citizen of the State of Texas. In other words, he had on the first day of November, 1882, no right, title or interest under or by reason of any application that he had made for the purchase of about one million acres of land. Neither does the proviso help it. The proviso is: "Provided, it shall appear that such application has been regularly made and filed in such manner as will under the terms of said law entitle the said Russ to become the purchaser of the said lands from the State of Texas."

This proviso was and is an impossibility. The application did not entitle the defendant in error, as against any other person, firm or corporation, to become the purchaser of the said lands from the State of Texas. The application, even giving to it its broadest interpretation, is only one of several necessary steps, not only to be taken by the defendant in error or the applicant, but also by certain officers of the State, before the right

to purchase becomes vested. Whether then it can be assigned or not is another question.

Neither was it possible for the defendant in error to "sell, transfer and assign unto the plaintiff in error any rights, titles or interest in said lands acquired by his said application and files." No such land had been acquired. No right, title or interest in any land had been acquired. The act does not limit the amount of lands that may be purchased by any person, firm or corporation; so that any person, by giving notice that he wanted the land surveyed, or, to use the language of the contract, by "making application for the purchase," could prevent, for the whole time specified in the act, the land from being sold. Certainly such was not the intention of the Legislature.

The first question, then, is, did the defendant in error have an assignable interest in the million acres of land on the first day of November, 1882? Did he have an interest that he could sell—that he could transfer and assign?

This question has been answered in the case of Campbell vs. Blanchard, 63 Texas, 148. In that case it was held that under the act of July 14th, 1879, persons who had done nothing except to make an application for survey had no vested right to the lands which they sought to purchase, the Court using the following language:

> "This is evident from the construction of the "act itself; and persons claiming under it must "show that they had done such acts as in con- "nection with the law entitle them to the land. "If the Act of July 14th, 1879, be considered as a "proposition made by the owner of land to sell to

" whomsoever might desire to buy, then it is cer-
" tainly true that one desiring to become a pur-
" chaser must comply with the terms upon which
" the owner proposes to sell before he may acquire
" any rights."

A like question arose in the case of R. E. White and others against Thomas P. Martin and others (66 Texas, p. 340), in which the case of Campbell against Blanchard is referred to and acquiesced in. The opinion upon this question is as follows:

" The first step to be taken under the act (of
" July 14th, 1879), by one desiring to buy was an
" application to survey the land desired. This ap-
" plication had to be made to the surveyor of the
" county in which the land was situated. This
" application conferred on the applicant no ab-
" solute right to have a survey made, for it was
" only when such applications were made by re-
" sponsible parties that the law made it the duty
" of the surveyor to make such surveys. Who was
" to judge whether the applicant was a responsible
" person? Certainly the surveyor, at least, in the
" first instance, and there were good reasons, when
" we look to the whole act, why the right to have
" a survey made was made to depend on the re-
" sponsibility of the applicant.

" The land embraced in the act was open to
" pre-emption as well as to sale, and it was the
" policy of the State not to withdraw the land from
" appropriation to homestead claims upon the
" mere application of speculators who, if a mere
" application to purchase would operate to with-
" draw it from such appropriation, might apply
" for land which they neither intended nor had the
" ability to purchase; and so, for the purpose of
" speculating on those who desired to become

"actual settlers—a class always favored by the "laws of this State—providing for the disposition "of its vacant public domain.

"The act itself indicates a desire to raise money "by sale, and if a mere application to purchase "could have the effect to withdraw it from sale for "any period of time, that purpose could be de- "defeated for a time for speculative purposes by "applications made by persons who neither in- "tended nor were able to buy. The whole act "shows that an application was not intended to "affect the right of the State to sell to any person "who might take the steps necessary to buy the "land or to grant it to an actual settler.

"The second section of the act provides: "'That any person, firm or corporation desiring "'to purchase any of the unappropriated lands "'herein set apart and reserved for sale may do "'so by causing the tract or tracts which such "'person, firm or corporation desires to purchase to "'be surveyed by the authorized public surveyor "'of the county or district in which said land is "'situated.'

"The application evidences a desire to pur- "chase; *i. e.*, to acquire the right to have the land "applied for by further complying with all the "terms of the act; but this desire may not be re- "garded by the surveyor if, in his judgment, the "applicant be not a responsible person, and thus "the application be ineffective in placing on the "surveyor even the duty to survey.

"If the applicant be deemed or even declared a "responsible person, still the statute does not de- "clare that the application shall operate as a pur- "chase. Until there is a purchase there can be no "right which the law recognizes. The application "to buy or to have surveyed may be regular, the "surveyor satisfied of the responsibility of the ap-

" plicant and ready to make the survey, but when " this point has been reached they have only " arrived at that stage of the negotiation and dis- " charge of duty by the surveyor which authorizes " him to do the act which the law declares shall " operate as a purchase. The surveyor then has " the power, but until it is exercised by doing the " very act which the law declares shall operate as " a purchase, his will combined with the will of the " applicant can no more operate as a sale or a " purchase than can the willingness of an attorney " acting under a power which provides the manner " in which it shall be exercised, coupled with the " expressed desire of the purchaser to buy at " fixed terms, operate as a sale until the sale is " consummated by the exercise of the power in the " mode and manner provided.

" How may the applicant become a purchaser? " The statute answers the question. He ' may do " so by causing the contract or contracts which " such person, firm or corporation desires to pur- " chase to be surveyed.' When this is done as " the act contemplates, then, and not before, " the State contracts, upon the purchaser's com- " plying with the other requirements of the act, " that it will convey to him the land surveyed. " When this point was reached there existed an " executory contract which gave the purchaser a " vested right on complying with his part of the " contract to have the land purchased, of which " subsequent legislation cannot deprive him.

" The eight section of the act provides that ' af- " ' ter the survey of any of the public domain " ' authorized by this act, it shall not be lawful for " ' any person to file or locate upon the lands so " ' surveyed, but such file or location shall be ut- " ' terly null and void.' Thus is further evidenced " the intention of the Legislature, that no right

"should be deemed to vest in an applicant prior "to a survey—prior to which time it might be "appropriated by a pre-emptor, or by any re- "sponsible person, without infringing any vested "right of a former applicant.

"The survey was made for the appellees within "the time prescribed by law, and thus was vested "his right. The field notes were returned to the "General Land Office within the time required by "law, as was the full price for the land paid to the "treasurer of the State."

Now, it will be seen from this decision:

First. That the land embraced in the act was open to pre-emption as well as to sale.

Second. That it was not the policy of the State to withdraw land from homestead claims on the mere application of speculators.

Third. That the desire of the State was to raise money by sale, and that if a mere application to purchase could have the effect to withdraw the land from sale, the purpose of the State could be defeated for a time for speculative purposes.

Fourth. That the act was not intended to affect the right of the State to sell to any person who might take the steps necessary to buy it, or, in the meantime, to grant it to an actual settler.

Fifth. That the application to have the survey made evidences only a desire to purchase—to acquire the right to purchase—by further complying with the terms of the act.

SIXTH. That until there was a purchase there can be no right which the law recognizes.

SEVENTH. That the applicant must cause the tract or tracts he desires to purchase to be surveyed, and the survey must be within the time fixed by the act, and the map and field notes of the survey must be returned within the time prescribed by law, and then the person having caused the land to be surveyed has sixty days within which to purchase, and this right to purchase is then a vested right of which he cannot be deprived. But the moment the sixty days have elapsed he has no right. Not only has he no right, but the law says that he shall not become a purchaser on any terms. So if the survey be not made within the time and this map and field notes are not returned within the time, he loses his right to purchase.

In this case it is only claimed that at the time the contract was made the defendant in error claimed to have made application for the purchase of about one million acres of land.

As he could not have made an application to purchase, the probability is that what he intended to set out in his contract was that he had applied to have about a million acres of land surveyed. This being so, he had no right, title or interest in the lands.

It is set out in the contract that he is to transfer and assign unto the plaintiff in error all his rights, titles and interest in said lands acquired by his said application and files.

We insist that it was impossible for him to have acquired any rights, titles or interest in the lands by his said application, and that on the first of November,

1882, he had nothing to sell. He had no interest that could be transferred or assigned in any manner whatever.

Then, according to his own statement, he had only taken the first step—the necessary steps being as follows: *First*, an application to the surveyor to survey the land; *second*, that the surveyor should survey it within three months; *third*, that within sixty days after he had surveyed it—no matter how soon he surveyed it—to certify to a record and map of the field notes of said survey; *fourth*, and also within the said sixty days the surveyor was to return and file the same—that is, the map and field notes—in the General Land Office; *fifth*, then the person, firm or corporation—not the assignee of the person or the firm or the corporation—must within sixty days after the filing in the General Land Office pay into the said treasury fifty cents an acre; and then the purchaser was entitled to a patent. Of these five steps, the defendant in error claims only to have taken the first at the time the contract was made.

If this contract be held good under the act, then it must be held to have been legal to defeat the act. Here was a purchaser willing to give fifty cents an acre for one million acres of land. Thereupon the defendant in error made application to have the land surveyed, so that he could compel this would-be purchaser from the State of Texas to pay him twenty-five cents an acre for the right to purchase under this act. In other words, the defendant in error, under the law, as is claimed, by simply making an application to have a survey made, put himself in a position to defeat the sale of one million acres of land by the State of Texas,

unless the purchaser would pay him between $300,000 and $400,000 for the privilege.

The only claim he had upon this twenty-five cents an acre was the pretense that he wished to purchase, whereas, according to his own petition, he did not wish to purchase. He wished to sell any right he had by virtue of the application. In other words, he was standing between the State of Texas and the real person who wished to purchase, and he said to the person who wished to purchase, "You can have the privilege of buying for twenty-five cents an acre, payable to me." Now he calls upon a court of justice to give him the money, he having succeeded in preventing a sale of this land by the State of Texas to the one who really wished to purchase.

V.

The Second Question.

THE SECOND QUESTION IS, IF IT BE HELD THAT THE DEFENDANT IN ERROR HAD ANY RIGHT, TITLE OR INTEREST ON THE FIRST DAY OF NOVEMBER, 1882, WAS THE RIGHT LOST?

The statute fixes, not only what shall be done in order to purchase the land, or as a condition precedent to the purchase, but also the time in which it shall be done. *First*, the survey must be made within three months; *second*, the proper return must be made of such survey by filing the field notes and map in the proper office within sixty days—not after the three

months, but after the survey has been made—and within the same sixty days the same papers must be filed in the General Land Office. After this has been done, the person, firm or corporation who made the application for the survey has the right within sixty days to pay fifty cents an acre into the treasury of the State; and thereupon patent is to issue.

In the case at bar (Record, p. 102) it shows that the surveys were made—the first on the 20th of October, 1882, and the last but one on the 9th day of November, 1882. *This is all the evidence as to the time when the surveys were finished.*

The law gave to the surveyor sixty days after the surveys were made to file the map and field notes in the General Land Office. The first survey was made on the 20th of October, and the sixty days within which the surveyor had the right to file the field notes and map expired on the 19th of December, and the field notes, as a matter of fact, were filed nineteen days afterwards, to wit—8th of January, 1883. One survey was finished on the 9th of November, 1882. This included Sections 1 to 24 (Record, p. 103), and was filed in time, and is the only survey in compliance with the law. Yet the Court upon this point instructed the jury as follows :

> " After the surveys are returned, recorded and
> " mapped in the surveyor's office, sixty days are
> " allowed in which to have same filed in the Gen-
> " eral Land Office at Austin, and the certificate
> " from the General Land Office shows that on the
> " 8th of January, 1883, plaintiff filed in the Land
> " Office 1813 surveys of 640 acres each."

The learned Judge certainly made a mistake in giving this charge. The law does not provide that after the surveys are returned and recorded and mapped in the surveyor's office sixty days are allowed in which to have the same filed in the General Land Office at Austin. The law is as follows:

"SECTION 3. It shall be the duty of the surveyor to whom application is made by resporsible parties to survey the lands designated in said application within three months from the date thereof; and within sixty days after said survey to certify, to record and map the field notes of said survey, *and he shall also within the said sixty days return to and file the same in the General Land Office.*"

The surveyor does not have sixty days in which to certify, record and map the field notes of said survey, and then sixty days more to return to and file the same in the General Land Office. Both these things must be done within the same sixty days. This Court, relying on that view of the law, in his charge says:

> "Suppose, however, that you are unable to as-
> "certain the exact date at which these field notes
> "were recorded and mapped in the El Paso
> "County Surveyor's office. Then I charge you
> "that the law makes it the duty of the surveyor to
> "send up the field notes to the General Land
> "Office, and the presumption would be, in the ab-
> "sence of proof, that this public official discharged
> "his duty and sent the same up within the time."

The Court evidently had it in mind that the surveyor had sixty days *after* he should have recorded his field notes in the County Survey's Office of El Paso County to return the same to the General Land Office, and for

that reason says that the presumption of law in the absence of proof is that the surveyor did his duty and did file the necessary papers in the County Surveyor's Office, and, further, that it is to be presumed that within sixty days after such filing in El Paso County, he did return the papers to the General Land Office. But the Court is reasoning from wrong premises. The surveyor must return the survey, with the maps, &c., to the General Land Office—not within sixty days *after* he does this in El Paso County, but within sixty days *after* he has made the survey.

The Court endeavored to avoid the fact that the returns had not been made to the General Land Office within sixty days after the survey by claiming that the presumption was that they had been filed in the General Land Office within sixty days after they had been filed in the County Surveyor's Office in El Paso County.

The Court was requested to instruct the jury that "to entitle any one to any benefit as a purchaser of land under the law governing plaintiff's application, it was necessary that the field notes of the survey should have been returned to the General Land Office within sixty days after the surveys;" that "the evidence shows that plaintiff returned said surveys himself, and that he is entitled to no damages upon such portion thereof as he returned after sixty days from the time they were made, since no one can acquire any benefit therefrom."

This the Court refused to give. This refusal must have been based on the opinion of the Court, to the effect that the surveyor had sixty days in which to file the papers with the County Surveyor and sixty days from that time to file the same in the General Land

Office; whereas the law is perfectly clear that both things must be done within the same sixty days, counting from the date of the survey.

Claiming, as we do, that time was of the essence and that the State had a right to make the offer of sale on certain conditions, then a failure to have the land surveyed within the time, or to have the returns made within the time, or to pay the money within the time, deprives the person, firm or corporation who made the application for a survey of the right to purchase.

The reason for this is apparent. The State did not wish to give speculators an opportunity to trade on the necessities of the State, nor to prevent the preemption or purchase of the public lands by actual settlers. Any other interpretation would put it in the power of the County Surveyor to withhold his survey indefinitely and thus defeat the object of the law; so a surveyor could fail to survey within three months or even a year and thus keep the land from actual settlement and from sale.

Taking all these things into consideration, it seems to us that time is of the essence of this contract or of this proposition made by the State; consequently, these surveys and these returns and certificates and filings must all be within the time specified, or the person applying for the survey obtains no rights.

VI.

As to Assigning an Application for Survey.

Could a person, firm or corporation, under the Act of July 14th, 1879, assign an application for a survey?

Section 9 provides that: "If any applicant should fail, refuse or neglect to pay for the land within the time prescribed in the fifth clause of the act, that he should forfeit all rights thereto and should not thereafter be allowed to purchase the same, but that the land so surveyed might be sold by the Commissioner of the General Land Office to any other person, firm or corporation who should pay into the treasury the purchase money therefor."

This prohibition seems to be of the nature of a penalty. The act says to any person who fails to comply with the provisions, not only that he shall forfeit all rights, but that he shall not be allowed to purchase at all.

In the case at bar it is only claimed, that when the contract was made the defendant in error had applied for leave to purchase; that is to say, for a survey.

Of course it could not at that time be known whether he would or would not comply with the Act of July 14th, 1879. Neither was it then known, neither could it be known, whether the surveys and returns would be made in accordance with the Act. So that on the first day of November it was impossible to tell whether the defendant in error would ever be vested with the right to purchase. All that was then claimed was that he had made the application to purchase or for a survey, and

that he would " transfer and assign all of his said right, title and interest to the plaintiff in error that he had acquired by his said application."

Upon this very point the Court was asked to give the following instructions to the jury (p. 121) :

" That on the first day of November, 1882, the right, title and interest of Russ, the plaintiff in error, in his application and files on land and which he contracted to sell was not a vested right in or to any particular lands, nor was it a vested right to acquire lands; that the acceptance by the surveyor of plaintiff's application for land invested plaintiff with no right that he could sell ; that the promise contained in the paper marked 'Exhibit M,' on which this action is based, to pay for the transfer of plaintiff's interest in his files and applications within fifteen days was without consideration."

This instruction should have been given.

The plaintiff did not have any vested right in or to any particular lands, nor had he a vested right to acquire any particular lands. He had no right and no interest that he then could sell or contract to sell, and consequently the agreement was without any consideration whatever.

The Court, however, did instruct the jury on this point (p. 111) as follows :

> " By the terms of this contract plaintiff agreed
> " to sell the defendant his right to secure
> " these lands and did agree to pay the twenty-
> " five cents per acre for all the lands that
> " plaintiff had made application for, pro-
> " vided it should be ascertained that the lands
> " were subject to sale, as provided in the law
> " of 1879, and were covered by plaintiff's

"application. In short, if, upon examination, "it should be found that by going forward the "party could secure the lands, then the plaint- "iff to pay for the chance to become the "purchaser, and then the plaintiff was to con- "vey his right, title and interest to the de- "fendant."

This instruction is exactly contrary to the law as laid down in the case of *White against Martin*, before referred to, in which the Court holds that there can be no right which the law recognizes until there is a purchase, and that the application to have surveyed may be regular, but that such application vests no right in the applicant. Besides, the Court instructed the jury that the defendant in error sold to the plaintiff in error a chance to become the purchaser.

The defendant in error had no greater chance to become the purchaser than the plaintiff in error. Their chances of purchase were equal. As a matter of fact, the defendant in error did not wish to purchase. He wished to sell; and he convinced the plaintiff in error that by applying for the survey, he, the defendant in error, could prevent the purchase and sale of the land as between the plaintiff in error and the State, and that as a consequence the purchase would have to be made from him, the defendant in error. That is, that he would levy a toll of twenty-five cents an acre on the land by virtue of his application.

VII.

The Measure of Damages.

What is the measure of damages?

In this case the defendant in error had applied for the survey of certain lands, and he proposed to sell this application; or, in other words, to assign all his right, title and interest in and to the land, for which he made such application, for twenty-five cents per acre—ninety per cent. of which was to be paid on the 15th of November, 1882, the contract having been made on the first of November.

It has long been held that damages ought to be purely compensatory—that they should be concisely commensurate with the injury. Neither more nor less.

Yates vs. Joyce, 11 Johnson, 136.
Lockwood vs. Allen, 7 Mass., 256.
Bussey vs. Donaldson, 4 Dall., 207.
Fay vs. Parker, 53 N. H., 342.

On the 15th of November the defendant in error had parted with no right. He had on that day all the interest in the land he ever had. All rights that he acquired by virtue of his application for a survey he still retained; and, if that right was of any value, it was his duty either to dispose of it and charge the plaintiff in error with the difference, or, if necessary to its protection, to take further steps. Then he would be under obligation to take such reasonable steps for the preservation of the property.

The measure of damages in such cases has been fixed by the Supreme Court of Texas in the case of Kemp-

ner vs. Heidenheimer, reported in 65 Texas, page 587. In this case it was held that:

> "The measure of damages for breach of con-
> "tract of sale of land by the purchaser is the
> "difference between the contract price and the
> "salable value;" and, further, that "such value
> "may be fixed by fair resale after notice to the
> "party to be bound by the price as the value
> "within a reasonable time after the purchase,"
> citing:
>
> Sutherland on Damages, Vol. II., pp. 195 *et seq.*
>
> Bowser vs. Cessna, 62 Penn. State, 148.

In the case of *Kempner vs. Heidenheimer* it was also held that, as no such sale was made, the plaintiff was only entitled to recover the difference between the market value at the date of defendant's breach and the price defendant had agreed to pay, and that "it was the duty of the plaintiff to establish these factors in the measure of his damages."

In the case at bar no evidence was introduced as to the value of the interest the defendant in error claimed to have on the 15th of November, 1882, and no evidence as to what damage he suffered, nor as to the amount for which he could have sold his supposed right or interest.

We insist that it was necessary for the defendant in error to establish the amount of damages sustained, and that he could only do this by showing the difference between what the plaintiff in error was to pay and the value of his interest at the time.

We also claim that it was the duty of defendant in error to preserve whatever rights he had. It was held

in the case of *Warren vs. Stoddard* (15 Otto, p. 229), that "the rule is that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

There is, so far as we know, no difference in the rule between contracts for the sale of real and contracts for the sale of personal property. A refusal to pay for real property at the price agreed upon and at the time subjects the party in default to the damages sustained by the vendor, and these damages are to be measured by the difference between the contract price and the price at which the property at the time of the breach could have been sold.

The rule is precisely the same in personal property. In the case of *Maddom vs. Texas Continental Meat Co.* (65 Texas, 487), it is held that:

> "When a vendee refuses to receive personal
> "property contracted for, the seller has either of
> "three remedies. He may hold the property as
> "the property of the vendee and sue for the price;
> "or he may foreclose his vendor's lien upon the
> "property by a fair sale of it and sue the vendee
> "for the portion of the agreed price he fails in
> "this way to realize; or he may treat the property
> "as his own and sue for damages. If the vendor
> "elect the latter remedy, the measure of his re-
> "covery is the difference between the contract
> "price of the thing refused and its market value
> "at the date when it ought to have been received."
>
> Citing Parsons on Contracts, Vol. 3d, 209.

In the case at bar defendant in error treated the property as the property of the plaintiff in error, but he tendered no assignment of any right or title he might have had—no deed—nothing. Yet the Court (Record, p. 113) instructed the jury that the measure of damages was twenty-five cents per acre on 1,144,320 acres, provided the jury found that the defendant in error had fulfilled on his part all that was required of him, and that the plaintiff in error was in default for not paying as was agreed.

The Court was requested by the attorneys of the plaintiff in error to charge the jury that "the measure of damages would be the difference between twenty-five cents per acre for as many acres as were embraced in the plaintiff's application to the County Surveyor to purchase lands and the diminished market value below that figure on the 15th of November, 1882;" but that "no such special damages can be recovered unless they are alleged and proved, and that, since such damages have neither been alleged nor proved, you" (the jury) "will find for defendant." This should have been given. The rule as to the measure of damages is clearly stated in this instruction.

Let us turn this case exactly around. Suppose that defendant in error, on the 15th day of November, had refused to assign whatever right he had, and that the plaintiff in error had tendered him the money, what then would have been the damages to which the plaintiff in error would have been entitled?

In *Dunshee vs. Geoghegan* (25 Pac. Rep., 731) it is held that "in an action for breach of contract to convey land against a vendor, the vendee's damage is the difference between the contract price and the value of the

property at the time the conveyance should have been made."

Citing: Hopkins vs. Lee, 6 Wheat., 109.
Mark vs. Patchen, 42 N. Y., 175.

See also in the case of *Muenchol vs. Roberts* (77 Wis., 520). It is held that "the true measure of damages in such case is the difference between the value of the land at the time the contract was made and the agreed price."

It seems that this rule must be applied as well to the vendee as to the vendor. There cannot be one rule for one party to the contract and another for the other. So it was held in the case of *Allen vs. Mohn* (Mich., 49 N. W., 52) that the measure of damages, where after purchase of land the vendee abandons the contract, is the difference between the contract price and the value of the land at the time of the abandonment.

In the case at bar the contract was for the sale of a supposed interest in real estate and that interest is described in the contract as follows:

"WHEREAS said Russ claims to have made application in due form for the purchase of about one million acres of land by virtue of an Act of the Legislature of Texas, approved July 14th, 1879, and Telfener has agreed and promised to pay to said Russ, as consideration of his sale, transfer and assignment of all his said rights, titles and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer and assign to the said Count Telfener all his rights, titles and interest in said lands acquired by his said application and files."

Now, it must be conceded that if the defendant in

error had been the actual owner of the land and the plaintiff in error had contracted to pay him a certain price per acre and had failed and refused, that the measure of damage would have been the difference between the contract price and what the land could have been sold for at the time of the purchase. Does it change this rule because Russ did not own the lands, but only claimed to have a certain interest in the lands? We insist that the rule for the measure of damages is the same as to vendor and vendee. If the vendor fails to comply with his contract, the vendee is entitled to the difference between the contract price and the value at the time of the breach, and if the vendee fails to take the land, then the vendor is entitled to the difference in value between, of the contract price and the value of the land at the time of the breach.

Applying this rule to the case at bar, the defendant in error, providing the contracts were good, and providing he had anything to sell, would be entitled to the difference between the twenty-five cents an acre and what he could have sold his interest for on the day of the breach.

And then again the Court was asked to instruct the jury that to entitle any one to any benefit as a purchaser of land under the law governing plaintiff's application, it was necessary that the field notes of the surveyor should have been returned to the General Land Office within sixty days after the survey.

The evidence shows that plaintiff returned said surveys himself, and he is entitled to no damages upon such portion thereof as he returned after sixty days from the time they were made, since no one can acquire any benefit therefrom.

We think that the law is clear upon this point. Time was of the essence of the law, and the survey must be completed within three months, and then sixty days were allowed after the survey to file the field notes in the office of the County Surveyor and General Land Office.

VIII.

DID THE PLAINTIFF IN ERROR MAKE THE CONTRACTS IN QUESTION?

The plaintiff in error filed a plea of *non est factum* and he denied that he ever made the contract himself, and also denied that the man claiming to act as his agent—C. Baccarisse—was authorized to make any such contract on his behalf. He insisted that his agent Westcott only had the right to obtain an option and that Baccarisse could have had only such authority to agree upon a contract to be submitted to the plaintiff in error, to be passed upon by him after the property should have been examined by an expert or by some person in whom the plaintiff in error had confidence.

As to the execution of this contract the evidence was conflicting.

The plaintiff in error testifies that he never authorized C. Baccarisse to make any such contract as Exhibits "M" or "N." He testified that he had never given Baccarisse any authority to purchase large bodies of land in Texas, and that he had authorized Westcott, Battori, Hayes and Baccarisse to file upon said lands

known as fifty cent. lands; that Westcott and Battori were only authorized by him to make contracts for the purchase of lands from private persons with instructions to bind the seller to sell, but not to bind him, the plaintiff in error, to buy, and that all the contracts that he had authorized, in order to become binding, were to be first approved and accepted by him, and that such approval and acceptance was only to be after the lands had been visited by an expert and a favorable report made to the plaintiff in error.

The evidence as to the authority of Baccarisse was, to some extent, contradictory.

Baccarisse himself admitted that he had never had any authority to make the contracts in question.

On page 72 of the record Baccarisse was asked "whether or not, after the adjournment of Court in June, 1884, he did not, on the cars between Austin and Houston tell Judge CALLENDER that he had no authority in regard to this matter, making these contracts, and that he had no authority to bind Telfener except as he got from Westcott," and in reply to this question Baccarisse said, "I have always stated, and the whole proceeding will show, that I was under both Westcott and Batorri, except that I had a letter from Count Telfener himself referring me to Westcott and I was to obey Westcott's orders. I told Judge CALLENDER about it. I had no direct instruction or communication from Count Telfener in this matter with Russ, but I acted under Westcott's instructions."

He admits (page 73) that he received no letter from Telfener, but that he received his instructions from Westcott; and he further states that he believed all the time he was acting under the orders of Westcott;

that he was under the instruction of Westcott all the time.

We refer to this testimony simply to show that the testimony was conflicting; that the plaintiff in error insisted that he had never authorized any such contract and had never ratified the contract; that it was understood from the first that all these contracts were to be subject to approval by him after an inspection of the lands.

The plaintiff in error requested the Court to instruct the jury that "no words or acts of the defendant can be considered a ratification of the contract or a recognition of it as binding upon him unless such words or acts were said or done after the defendant had full knowledge of the nature and terms of the contract; and if the jury find that the defendant had instructed his agents to make only conditional contracts for lands subject to his ratification, and had not authorized them to make a contract absolute in terms such as the contract sued on; but if the jury further find that after the contract had been made the defendant included the land covered by that contract with other lands which he proposed to sell to a syndicate in London, this action of the defendant cannot be held to be a ratification or adoption of the contract if the defendant, when so acting, was not fully informed of the character and terms of the contract, but was acting under the belief that the contract had been made subject to his acceptance or rejection. If the defendant at the time of the said action was not fully informed of the nature and terms of said contract, it is not material whether it was by the failure of his

own agents or by accident that he had not at that time received full information."

This the Court refused to give.

The plaintiff in error also requested the Court to instruct the jury that "if the jury found from the evidence the defendant did not in fact authorize Westcott or Baccarisse to make absolute contracts for the purchase of lands or files upon lands, but that their authority, as conferred by the defendant and, as understood by them, was only an authority to file on State lands or to make with private parties conditional contracts subject to the defendant's approval and ratification upon the receipt of an expert's report as to the character and quality of the land, and that if the jury further found that the defendant in his correspondence with his agents had used expressions which, if taken alone, might seem to imply that the agents had a general authority to purchase lands for the defendant, the jury could not on account of such expressions hold the defendant bound by the contract sued on unless the jury further found that the letters or telegrams containing such expressions were shown to the plaintiff at or before the making of the contract sued on, and that he was thereby induced to believe that Baccarisse had authority to make said contracts."

This the Court refused to give.

And to such refusals the plaintiff in error then and there excepted.

The Court refused to instruct the jury (Record, p. 124) that it was immaterial whether the agency, if such agency was proved to exist, of Westcott or Baccarisse was general or special; the defendant, as principal, is only bound for the acts of said agents within the scope

of the authority which he held them out to the world as poosessing ; and if in making the contract of November 1st, 1882, or in anything they said or did in relation to said contracts, they exceeded the scope of such authority, their acts in excess of their authority are not binding on the said defendants.

Also, on page 125, "that the jury are instructed that if they believe from the evidence that Westcott and Baccarisse, or either of them, were the special agents of the defendant, acting under a special authority, and that the plaintiff had notice of the nature and character of such agency, then it was the duty of the plaintiff to inquire into the existence of the power and authority conferred upon such agents, and if the jury believe that in the making of the contracts of November 1st, 1882, said Baccarisse transcended his power, the defendant is not bound by said contracts unless he subsequently ratified them. It is a rule of law, which the jury will apply to the facts, that where an agent exercises power specially conferred, every act is void, so far as it affects the principal, which is not in strict conformity with his instructions, unless, as before stated, such act is given force and effect by subsequent ratification."

So, too, on page 125, defendant in error asked the Court to instruct the jury "that where one, as the alleged agent of another, attempts to bind his principal to pay within a short time a large sum of money, amounting to several hundred thousand dollars, the nature of the transaction is such as to excite caution on the part of the person dealing with the agent, and to impose upon him the duty to ascertain the nature and existence of the powers conferred; and if Bacca-

risse had no such power or transcended his instructions in executing the contracts of November 1st, 1882, the plaintiff cannot hold the defendant liable unless the defendant subsequently ratified the act."

All these special charges were in accordance with law and should have been given.

United States vs. City Bank, 21 How., p. 356.

Latham vs. Pledger, 11 Texas, 439.

Wright vs. Doherty, 50 Texas, 42.

Phillip *et al.* vs. C. M. B. A., 17 N. W. Rep., 90.

Schimimelpennich *et al.* vs. Bayard *et al.*, 1 Pet., 264.

McAlpin *et al.* vs. Cassidy *et al.*, 17 Texas, 450.

Bank vs. Jones, 18 Texas, 811.

Jones vs. Ford, 60 Texas, 127.

Article on "The Law of Ratification," 19 Cen. L. J., 482.

McClelland vs. Whitely, 15 Fed. Rep., 323.

Craighead *et al.* vs. Peterson, 72 N. Y., 279.

Bennecke vs. Insurance Co., 105 U. S., 355.

Dean vs. Bassett *et al.*, 57 Cal., 640.

Recapitulation.

We claim: First. That the defendant in error had no interest that could be sold and assigned in the lands mentioned in the contract.

He had made an application to have certain lands surveyed.

This application was not the subject, and could not be the subject of sale or assignment.

It was only one of the several steps necessary to be taken before the defendant in error could have acquired any right to purchase. Having acquired no rights, no interests in the lands, he had nothing to sell.

According to the contract he was to assign this supposed right or interest on the 15th of November, 1882, the contract having been made on the first day of November, 1882. On the 15th of November it was impossible for him, under the law, to acquire any right to purchase. Consequently on that day it was impossible for him to assign anything to the plaintiff in error of value.

Second. We also claim that if the defendant in error had any right, title or interest on the 1st day of November, 1882, or on the 15th day of November, 1882, it was a right dependent upon other steps being taken within the time required by law. We also insist that these other steps had to be taken within the time required by law, not only by the defendant in error, but by the officers of the State.

(1) The survey was to be made within three months.

(2) Within sixty days after the survey was made, no matter how quickly it might have been made, the maps, &c., had to be filed, not only in the Surveyor's office of the county where the lands were, but also in the General Land Office at Austin. After such filing, no matter how soon after the survey the proper papers were filed in both offices, then the person who originally made application for the survey had sixty days within which to pay fifty cents per acre, and if he failed he was to be denied the privilege of purchasing at all.

The evidence in this case shows that the surveys were made and finished, some on the 20th of October, 1882, and the last but one on the 9th day of November, 1882. The right to file the field notes and map on the surveys made on the 20th day of October expired on the 19th of December, and the field notes, as a matter of fact, were filed nineteen days afterwards, to wit, on the 8th day of January, 1883.

There was one survey on the 9th of November, including twenty-four sections filed in time, and is the only survey filed in accordance with the law.

Upon this point the Court erred by instructing the jury that they were allowed sixty days to file the surveys and maps in the General Land Office *after* they had been filed with the Recorder of the county in which the lands were situated ; whereas the law provides that within the same sixty days they shall be filed in the county and in the General Land Office.

THIRD. We also claim that a person, firm or corporation applying for a survey of land under the Act of July 14, 1879, cannot assign such application ; that the

right of purchase is given, not to any person, firm or corporation and its assigns, but to any firm, person or corporation.

The law provides that if the person, firm or corporation fails to comply with the law and fails to purchase at the time, then it shall not be allowed to purchase at any price.

Certainly it was not the intention of the Legislature that the person, firm or corporation might assign the right and thus give to an assignee the privilege that the person, firm or corporation had lost.

FOURTH. We claim that the measure of damages must be held to be purely compensatory, and that the measure for a breach of contract of sale of land by the purchaser is the difference between the contract price and the salable value, and that such value may be fixed by a resale after notice to the party to be bound, or by evidence showing what the market value was.

We claim that the Court erred in its instruction to the jury with regard to the measure of damages.

If the defendant in error had an interest in real estate, then the measure of damages must be the difference in value. If he had not an interest in the real estate, then there is no measure of damages applicable to this case.

FIFTH. We also claim that the plaintiff in error did not make the contracts in question; that they were made by agents without authority. In other words, that it was perfectly understood that the contracts were subject to the approval of the plaintiff in error, and

that such approval was to depend upon the report to be made by an expert selected by the plaintiff in error himself.

SIXTH. That the Court erred in refusing the instructions asked by the plaintiff in error, and in giving those excepted to by the plaintiff in error.

SEVENTH. That on account of the errors aforesaid the said judgment should be reversed.

J. L. PEELER,
Attorney for Plaintiff in Error.

ROBERT G. INGERSOLL,
Of Counsel.

APR 30
JAMES H. McKE

Supreme Court of the United States.

OCTOBER TERM, 1891.

COUNT JOSEPH TELFENER,
Plaintiff in Error,

vs.

GEORGE W. RUSS.

No. 329.

Brief and Argument for Defendant in Error.

JOHN J. WEED,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

COUNT JOSEPH TELFENER, *Plaintiff in Error.*

vs.

GEORGE W. RUSS, *Defendant in Error.*

No. 329.

Brief and Argument for Defendant in Error.

STATEMENT OF THE CASE.

This case comes here by means of a writ of error, sued out of the United States Circuit Court, for the Western District of Texas.

The writ of error is prosecuted for the purpose of securing the reversal of a judgment rendered in that court, in favor of the defendant in error, and against the plaintiff in error, on the 9th day of March, 1887, for the sum of *three hundred and eighty-four thousand four hundred and nine dollars*, ($384,409.00.)

The case was tried before Hon. E. B. Turner, and a jury, and the exceptions taken at the trial, and

preserved in the record, suggest the questions which it is assumed will be urged as furnishing sufficient legal causes for reversing said judgment. There are preserved in the record *twenty-four* exceptions, and the plaintiff in error has, upon the record, made *thirty* assignments of error. In the absence of the brief of the plaintiff in error, the defendant must assume that each of said exceptions were taken in good faith; and that the assignments of error made upon the record will be renewed in the brief, and urged in the argument which may be made here on behalf of the plaintiff in error.

II.

ISSUES MADE BY THE PLEADINGS.

The plaintiff, in his declaration, set out and declared upon two certain contracts alleged to have been made between the plaintiff and the defendant, the said Count Joseph Telfener, on the 1st day of November, 1882.

The contract which furnished the basis for the judgment in the Circuit Court is attached to the petition or declaration, filed by the plaintiff Russ, and is marked "Exhibit M," and is as follows:

EXHIBIT M.

STATE OF TEXAS, }
County of Dallas. } *ss.*

This contract and agreement, entered into by and between George W. Russ, of Dallas County, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows:

Whereas said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso County, Texas, from the State of Texas, under and by virtue of an act of the Legislature of the State of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas, at 50 cents per acre and to the amendments to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso County at Ysleta; and whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of said lands from the State of Texas; and in such case has agreed to pay to the said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interests, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener all his rights, titles, and interests in said lands acquired by his applications and files.

In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

"The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly and properly made as aforesaid according to the provisions of said law and the amount of land covered or embraced within such application, shall proceed at once and inspect the records and files of the Surveyor's office, of El Paso County, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and

files thereof have been regularly and properly made in such manner as, under the terms of said law, would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said Surveyor's office and in the office of the Commissioner of the General Land Office of the State at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that, upon such payment being made, he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, title, and interest, that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same or any part thereof by, through, or under him. It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

After the transfer and assignment as aforesaid shall have been made by the said Russ the said Count Telfener shall proceed, without delay and have said lands surveyed and platted and the field-notes thereof returned and filed according to the provisions of said law.

Upon the completion of said surveys and field-notes, the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land the deficit shall be paid at once in cash to said Russ, by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

Witness our hands this 1st day of November, 1882.

GEO. W. RUSS,
J. TELFENER,
By C. BACCARISSE, Ag't.

Witness: CHAS. FRED. TUCKER,
WM. MCGRAIN.

(Record, pp. 8, 9, 10.)

Another contract made between the same parties on the same date, as that above recited, is also attached to the petition and declaration of the plaintiff Russ, is marked "Exhibit N," and is as follows:

EXHIBIT N.

This contract and agreement, entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows: Whereas the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso County, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the Legislature of Texas, approved July 14th, 1879, known as the 50 cent act; and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said lands and

file the field-notes and maps thereof in the surveyor's office of El Paso County, Texas, and in the general land office at Austin within the time required by the said law.

Now, therefore, it is agreed by the said Russ that if the sale and transfer shall be made under the said contract as aforesaid, he will, at his own proper cost and expense, make all the surveys, field-notes, and maps of the said lands and file them in the office of the surveyor of El Paso County, and in the general land office of the State, at Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office for said lands to said Count Telfener, his heirs, or assigns, the said surveys, field-notes, and maps to be correct, and in consideration of said services and payments to be rendered and paid by said Russ, the said Count Telferner agrees and binds himself to pay to said Russ in cash, at the city of Dallas or at Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz: Three (3) cents per acre when the survey and field-notes shall be completed and one (1) cent per acre when the field-notes shall be filed in the land office, and the balance when the patents shall issue.

Witness our hands this 1st day of November, A. D. 1882.

(Signed) GEO. W. RUSS,
J. TELFENER,
By C. BACARISSE, Ag't.

(Record, pp. 10, 11.)

And thereupon the plaintiff, in his declaration, averred substantially as follows:

1st. That on the 1st day of November, 1882, plaintiff was the sole owner of a certain valuable, valid, and transferable interest in the whole of a certain

body of land, containing, as subsequently ascertained by lawful survey, eighteen hundred and thirteen tracts of land of six hundred and forty acres each, being in the aggregate one million one hundred and sixty thousand three hundred and twenty acres, situated in the County of El Paso, and State of Texas, and forming a part of what is known as the "Pacific Reservation;" that plaintiff had become the owner of said interest in said eighteen hundred and thirteen tracts by complying with the requirements of the laws of the State of Texas, and particularly by complying with the requirements of the act of the Legislature of the State of Texas entitled, "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," approved July 14, 1879, as amended by the appropriate act approved March 11th, 1881, entitled "An act to amend sections one and six" of the above-entitled act of July 14, 1879.

That plaintiff, during the month of October, 1882, being a responsible party and intending to purchase said body of land, which was lawfully subject to purchase and sale under the terms of said acts of July 14, 1879, and March 11th, 1881, applied to the surveyor of the County of El Paso, State of Texas, in writing, for the purchase from the State of Texas and for the survey of said eighteen hundred and thirteen sections or tracts, describing the same by metes and bounds as a whole.

2d. That plaintiff, having thus made due application for the purchase and survey of said lands, was, on the 1st day of November, 1882, about to proceed to have said lands surveyed into tracts of six hundred and forty acres each, when defendant, by his duly authorized agents, applied to plaintiff to purchase of plaintiff his interest in said lands, acquired as hereinbefore stated; that plaintiff having not yet paid to the State of Texas the fifty cents per acre, to which said State was entitled, and defendant offering to assume said payment to the State, and de-

siring simply to contract with plaintiff for the purchase and assignment of plaintiff's right to purchase from the State, they, i. e., the plaintiff in person and the defendant by his agent—at the city of Dallas, Texas, on the 1st day of November, A. D. 1882, executed a written contract, evidenced by two separate instruments, each of which is made a part of this petition by a copy attached hereto and marked Exhibits M. & N.

3d. And plaintiff alleges, that pursuant to and in performance of said terms of contract hereinbefore immediately recited, the plaintiff in person and the defendant by his duly authorized agents repaired to Ysleta, El Paso County, Texas, on the 3d day of November, 1882, and then and there inspected the records and files of the surveyor's office of El Paso county, Texas, and the maps of said county in said surveyor's office and the application of plaintiff for purchase and survey of said Pacific Reservation lands, and that as a result of said inspection defendant found, and plaintiff avers, that the said application and files had been regularly and properly made in such manner as under the terms of said laws of the State of Texas would entitle the plaintiff to become the purchaser of said lands from the State of Texas; and plaintiff further avers that upon said inspection at Ysleta, by reference to plaintiff's said application and files and the maps of said El Paso county on file in said surveyor's office, and also on the 6th day of November, 1882, by an inspection of the maps of said El Paso county on file in the office of the commissioner of the General Land Office of the State of Texas, at Austin, Texas, by approximation that the number of acres embraced under said contract as covered by said application which the plaintiff, as such applicant, and defendant, as plaintiff's assignee under said contract, would be entitled to purchase from the State of Texas under the laws thereof, would be one million one hundred and sixty thousand three hundred and twenty acres; and

plaintiff avers that the full purchase price of said land at said contract price of twenty-five cents per acre, was two hundred and ninety thousand and eighty ($290,080) dollars, of which sum there became due and payable to the plaintiff from the defendant on the 15th day of November, 1882, under the terms of said contract, ninety per centum thereof, being two hundred and sixty-one thousand seventy-two ($261,072) dollars.

4th. And plaintiff further avers that on and prior to the 15th day of November, 1882, the defendant, having full knowledge of said inspection and approximation, and knowing himself to be indebted to plaintiff in said sum and having in his possession the duplicate of said contract (which had been executed in duplicate), was notified by plaintiff that he, the plaintiff, would be present at the city of Dallas, Texas, on the 15th day of November, A. D. 1882, for the purpose of receiving from the defendant said ninety per centum of said purchase price and for the execution to the defendant of any and all deeds or other instruments proper or necessary to convey, transfer, and assign to the defendant all and singular the rights, titles, and interests that the plaintiff had or was entitled to in and to said lands by reason of such application and files, and to bind himself by such conveyance, by covenant of warranty, against all persons claiming or to claim said land or any part thereof by, through, or under the plaintiff; and plaintiff further avers that on said 15 day of November, 1882, he, plaintiff, was present at his office in the said city of Dallas, Texas, during the whole of said day for the purpose of receiving from the defendant said payment of ninety per centum and for the purpose of executing to said defendant a conveyance in every respect conforming to the requirements of said contract, as hereinbefore recited, but that the defendant, without any explanation of his absence, and without any denial of his liability under said contract, and without in any manner asking delay or

postponement and without any request for modification, amendment, or recession of said contract, and without notifying the plaintiff as to defendant's whereabouts, wholly failed to appear in the city of Dallas, Texas, and utterly and entirely failed, and has to this time utterly and entirely failed to pay to this plaintiff any part of said purchase price, and that defendant has never since the execution of said contract, either in person, by agent or attorney, offered to make said payment to the plaintiff or to accept from the plaintiff said conveyance of said lands.

5th. And plaintiff further avers that ever since, and on the 15th day of November, 1882, up to and at this moment, he, plaintiff, has been and is willing, upon receipt of said purchase price as provided in said contract, to execute to said defendant the conveyance contemplated and agreed upon by said contract, and of this fact the defendant and his agents have been repeatedly notified since, and on said 15th day of November, 1882; and plaintiff further avers that since the 15th day of November, 1882, prior to bringing this suit, the plaintiff repeatedly notified defendant that he, plaintiff, relying upon said contract, would endeavor to sell said lands to other parties for the benefit of both plaintiff and defendant, holding the latter liable for any loss that plaintiff might incur by reason of a sale for a less sum than that specified in plaintiff's said contract with defendant; and plaintiff further avers that he at great expense and outlay of time and money endeavored constantly, from November 15, 1882, up to the 1st day of March, 1883, to sell said lands to other parties at a price equalling and exceeding the price agreed upon by the plaintiff and defendant in said contract for the benefit of said plaintiff and defendant, but that he wholly failed to make any sale thereof whatever, and on and after the 1st day of March, 1883, plaintiff endeavored to sell said lands at a lower price, than said contract price, but wholly failed to effect such a sale or any sale.

6th. Plaintiff further alleges that under the terms of said contract, as shown by "Exhibit M," it was therein recited and agreed that "after the transfer and assignment as aforesaid" (set out theretofore in said contract) "shall have been made by the said Russ," the plaintiff, "the said Count Telfener," the defendant, "shall proceed without delay and have said lands surveyed and platted and the field notes thereof returned and filed according to the provisions of said law. Upon the completion—said surveys and field notes, the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the sum so paid as aforesaid by said Count Telfener," the defendant, "shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid in cash at once to said Russ," the plaintiff, by the said Count Telfener," the defendant, "in the city of Dallas, Texas, or in Austin, Texas, as the said Russ may prefer."

7th. And plaintiff alleges that upon the execution of said instruments herein set out as "Exhibits M and N," constituting this contract for purchase and survey, he at once perfected arrangements for the surveying of said lands as agreed upon, and at the special instance and request of defendant, through his lawfully authorized agent, began such survey before the 15th day of November, 1882; that on defendant's failure to make payment of said ninety per centum of the purchase price plaintiff notified defendant, through defendant's agents, that he, plaintiff, had already contracted with the county surveyor of El Paso County, Texas, for the survey of said lands, and that he, plaintiff, having already incurred a liability for the cost of such surveying and having already expended large sums of money in making said survey, and that therefore he, the plaintiff, was willing at any time, at either the city of Austin or the city of Dallas, Texas, to receive said ninety per centum of the purchase money and execute such conveyance to defendant, and that

he, plaintiff, would continue said survey until it was completed, holding himself ready and liable at any time that defendant would perform his part of said contract to make to the defendant the conveyance called for by said contract.

8th. Plaintiff further alleges that, with the view of protecting the rights of both plaintiff and defendant under said contract and to prevent said lands from being forfeited to the State of Texas by his, plaintiff's, failure to have them surveyed within the time required by law, he, plaintiff, caused said survey to be completed according to law, and on the 8th day of January, 1883, he filed lawful and complete field notes of such survey, duly certified and executed by the Surveyor of El Paso county, Texas, accompanied by proper and complete maps, in the office of the Commissioner of the General Land Office of the State of Texas, at the city of Austin, Texas, where said field-notes and maps were duly and officially filed, and where they yet remain as part of the records of that office. Plaintiff further avers that said survey, field-notes, and maps, were and are correct. Plaintiff further avers that said field notes were made in his name, not merely in compliance with law, but also to protect himself until defendant should make the payments due plaintiff under said contract, but not with the view of asserting claim to said lands adverse to defendant's rights under said contract upon defendant's performance of his agreements therein.

9th. Plaintiff further alleges that defendant, having in his possession continuously from and after the 1st day of November, 1882, the duplicate of said contract, and being fully advised of plaintiff's actions, demands, and willingness to perform said contract, never notified plaintiff that he, defendant, intended to refuse to accept the benefits of said contract, but, on the contrary, held himself out to capitalists as being the owner of said lands under said contract. Plaintiff further avers that he performed, on his part,

each and every act by him stipulated to be done, except that he did not make said conveyance to defendant, because of the latter's failure to perform any part of his agreements; that plaintiff has always been and still is willing, and hereby offers to execute to the defendant the conveyance mentioned in said contract, and in all things to perform his part of said contract.

10th. Plaintiff further avers that in all things the defendant has failed to perform his part of said contract, especially in failing to pay to plaintiff said purchase price or any part thereof, in failing to pay plaintiff the five cents per acre for surveying said lands and filing the field-notes and maps of said survey, amounting to fifty-eight thousand and sixteen dollars, and in failing to pay to the State of Texas, as required by law, the fifty cents per acre entitling the purchaser to patents—all to plaintiff's damage, to the sum of four hundred thousand dollars.

(Record, pp. 1, 2, 3, 4, 5, 6, 7, 8).

THE DEFENDANT'S PLEAS.

The defendant Telfener on the 2d day of February, 1886, demurred, and plead to the said declaration as follows:

1. Said petition is insufficient in law to require him to answer thereto; wherefore, &c.

2. Defendant specially excepts to said petition as follows: To so much and to such portions and allegations of said petition as seek a recovery of damages for anything done by plaintiff or any expense incurred in plaintiff by carrying out or attempting to carry out by plaintiff any of the terms or provisions of the contracts in said petition mentioned after the 15th day of November, 1882.

3. Further answering, defendant says that the said Pacific reservations in plaintiff's petition mentioned and upon which it is alleged plaintiff has made files and locations entitling him to purchase the lands covered thereby was not subject to sale by the State of Texas, but was a "reservation" constituting a contract, the obligation of which could not be impaired, between the State of Texas and the said Memphis, El Paso and Pacific R. R. Co., as will more fully appear by the decision of the Supreme Court of the United States reported in the case of *Davis* vs. *Gray*, 16 Wall., 203; which said decision is referred to in support hereof; that said "reservation" segregated the lands in said "reservation" from the public domain of Texas liable to sale and placed them beyond the reach of the State, and the only way in which said reservation could be the subject of sale was by a surrender or relinquishment on the part of the said M., El P. & P. R. R. Co. of the exclusive right to further locate lands in said "reservation," as authorized and permitted by an act of the Legislature of the State of Texas, approved April 29, 1879, chapter 155, General Laws, page 175; and defendant avers that no such relinquishment or surrender as authorized by the said act had been made at the time of said pretended files and locations, and that there was not at said time of making the alleged contract in plaintiff's petition mentioned any legal right on the part of plaintiff to file or locate upon or acquire by purchase or otherwise any right, title, estate, or interest in and to the files, locations, and land in said petition mentioned, and the sale thereof by plaintiff to defendant was illegal and void and without any consideration whatever.

4th. Further answering, defendant says that if said Bacarisse ever had any authority to negotiate in regard to the purchase of land in Texas it was merely as an employee under one C. K. Wescott, and said Bacarisse was merely employed to enquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands subject to the inspection and approval of the lands by an expert or inspector sent out by a London syndicate to make such inspection and report, no such contract to be final and binding unless ratified by this defendant after such expert had reported his approval of the land, but neither Westcott nor any other person had authority to execute such contracts as are set up in plaintiff's petition. This defendant never knew till shortly before this suit was instituted that said Bacarisse had attempted to execute any such contract as are set up in plaintiff's petition, and if he ever heard that any contract had been made with plaintiff for lands he supposed it was a contract subject to his own ratification after report of said expert, and if he ever proposed to sell any of said lands to said syndicate or other capitalists it was done upon the supposition that he had a contract for the purchase subject to its ratification and which he expected to ratify if the expert aforesaid should report favorably upon the lands; but defendant says said expert reported unfavorably upon plaintiff's lands, and this defendant never ratified the alleged contracts made by Bacarisse.

5. And, without waiving his plea of *non est factum*, heretofore filed and verified by the affidavit of C. K. Westcott, but relying thereon, defendant, in connec-

tion with said plea and in verification and support of his defense of *non est factum*, set up in his original answer, pleads further as follows:

"And further answering, the defendant saith on oath that the contracts mentioned in plaintiff's petition and made exhibits thereof were not executed by this defendant nor by his authority, and that C. Bacarisse, by whom as agent for this defendant said contracts purport to have been executed, was not authorized by this defendant to execute said contracts or either of them."

(Record, pp. 20, 21).

To the plea of *non est factum*, the plaintiff, on the said 2d day of February, 1886, filed an exception in the nature of a demurrer, to said plea, as follows, to-wit:

"And now comes the plaintiff, by attorney, and excepts to the pretended plea of *non est factum* filed on this the 2d day of February, 1886, and says that the same is insufficient, in this, that the said plea does not controvert the allegations of plaintiff; that the contracts upon which this suit is brought and which form the basis thereof were adopted and ratified by the said defendant."

2d. Said plea is not filed in proper time, this cause having been at issue since the January Term, 1884, and defendant having plead to the merits; and plaintiff denies all the matters and things in defendant's amended original answer, and says that the same are not true and present no defense to this action.

(Record, p. 22).

On the 11th day of February, 1886, the defendant

Telfener, by leave of the Court, filed an amendment, "to his first amended original answer," by adding thereto the following further defense and plea, To wit :

Further answering, defendant says that if any such contract or contracts referred to in, and exhibited with, said petition, were entered into by his authority or ratified by him, which is expressly denied, the same were without any consideration, or if there ever was any valid consideration therefor, that said consideration has failed, in this, that the law which permitted the purchase of the lands in said petition mentioned, was repealed before the steps required thereby to obtain title, or any vested interest therein could have been or were taken, and that by reason of the failure of the plaintiff to acquire a valid subsisting interest and right in and to said lands before the repeal of said law, all right, if any, which defendant acquired or could have acquired under said contracts, was wholly lost to defendant, and defendant further says, in this connection, that even if he had complied with said contract, he could not have obtained patents to said lands, and the same would have been lost to him.

To this amended plea, the plaintiff on the 4th day February, 1886, filed an exception, in the nature of a demurrer, as follows, to wit :

1. Because said defendant in his said plea, does not allege and say that said failure of consideration, if any occurred, was in consequence or because of any default or failure on the part of said plaintiff.

2. Because said plea fails to show or allege that said failure of consideration, if any, was not because of any default or failure on the part of said defendant to do and perform the consideration and stipulations of said contract, and of this plaintiff prays

the judgment of the court: and for replication to said plea, plaintiff says the allegations in said plea are not true as therein stated and alleged, and of this he puts himself on the country, &c.

(Record, p. 23.)

III.

LEGAL PROPOSITIONS ASSERTED, AND AUTHORITIES CITED IN BEHALF OF DEFENDANT IN ERROR.

In the exceptions reserved by the plaintiff in error, and in the assignments of error made upon the record here, the judgment rendered by the circuit court is attacked, and sought to be reversed upon the following grounds, to wit:

1st. Because the contracts set out in the plaintiff's declaration were not the contracts of the defendant Telfener.

2d. Because the contract which furnished the basis of the judgment in the circuit court, even if said contract had been proved to be the contract of said defendant Telfener, was without consideration and void.

3. Because the damages assessed by the jury for the non performance of said contract by the defendant Telfener, were not such as were authorized under any recognized rule of law for the ascertainment or assessment of damages.

The specific objections to the judgment of the circuit court as revealed in the exceptions taken at the trial in that court and in the assignment of errors made upon the record here, are properly stated in the following causes or grounds of complaint:

1st. That the circuit court permitted improper evidence to be submitted to the jury.

2d. That the circuit court excluded from the consideration of the jury evidence that was competent, material, and essential to a proper presentation of the defence made by the defendant Telfener.

3d. That the circuit court erroneously instructed the jury upon the questions of law presented by the case in its pleadings, and in the evidence submitted in support thereof.

4th. That the circuit court refused to properly instruct the jury upon the request of the defendant Telfener.

The defendant in error proposes to consider the objections suggested in the record with reference to those exceptions and assignments of error which seem to be of sufficient gravity to be entitled to consideration here.

A. The evidence submitted justified the verdict of the jury, and the instructions of the Court correctly stated the propositions of law involved in determining the question as to whether Bacarisse, one of the agents of the defendant Telfener, was authorized to make the contracts sued on, as well as the question as to what would amount to a ratification of the contract by the defendant Telfener even if it had been made without authority by the agent, Bacarisse, who signed them in behalf of the defendant Telfener.

a. As to the evidence of the authority of Bacarisse to make and sign the contract dated November 1st, 1882, on behalf of the defendant Telefener.

The evidence upon this question shows that the authority of Bacarisse to make and sign that contract came to him from the defendant Telefener by means of communications from Telfener to Westcott, and from Westcott to Bacarisse, as well as by communications sent direct to Bacarisse by the defendant Telfener.

The inspiration of this contract was a scheme to purchase large tracts of land which the defendant Telfener expected to be able to sell at a large profit to a syndicate of English capitalists, with which this distinguished defendant was in correspondence.

AUTHORITY TO PURCHASE LANDS GIVEN BY DEFENDANT TELFENER TO WESTCOTT.

In the *first* letter of defendant Telfener to Westcott, dated September 29th, 1882, he writes as follows:

"LANDS. I am surprised that for the second affair of twelve hundred thousand acres a dollar an acre is asked, while it is almost impossible to sell the first lot for a dollar. In that event there would be no margin left. * * * If it is possible to have the 1,200,000 acres on the same condition as the first certificate (file,) I authorize you to do it immediately." (Record, pp. 36, 38).

On October 7th the defendant wrote to the same agent as follows:

"I telegraphed you yesterday evening and this morning that I am organizing a syndicate to whom I have sold *three million acres* of land in the County of El Paso. * * * As the emergency is great and urgent, and as you must within a few days go

with Scott in that direction, it will therefore be better to go directly to get these lands for me. For greater clearness, I repeat my ideas. *I must have the three millions acres of land.*

"1. Preferably by the condition of filing on them. Thus they cost $0.50, *and one has more time to pay for them.*

"2. A part to be in El Paso County, or in its proximity.

"3. From those 3 million there is to be deducted the part that I already have in 1,145,000 acres.

"4. If lands are not to be had on these terms, make a conditional contract for the 1,200,000 of Kneeland.

"5. In that event take the rest wherever it may be found.

"6. Essential quality of land to be good for grazing and with water.

"In case you cannot have immediately on account of matters on hand where you are, *send Mr. Bacarisse on clear and positive instructions*, and you can overtake him with Scott." (Record, pp. 37, 38.)

On October 9, 1882, Telfener wrote to Wescott as follows:

"As to the three million acres, go the most pressing—to ascertain whether they can be obtained, where, and their respective plats. The syndicate is progressing without these particulars. Therefore telegraph daily to all persons occupied in this matter, that they may hasten their work; also by telegraph send me the approximate boundaries; don't be saving of the telegrams in this matter. Remember well that if the two new millions cannot be found, we will have to come to terms with the owner of the 1,200,000 *at the quickest*, and look around for the balance. *In order not to be short of the three millions, we must search and search with all activity also, in the adjoining counties.* (Record, p. 38.)

On October 9th, 1882, Telfener wrote to Westcott as follows:

"EL PASO LANDS. I am most grieved to see the manner in which the surveyor of Isletta has stuck Mr. Hayes by giving him 114,500 acres instead of 1,145,000. * * * I have spent considerable sums in forming the syndicate. It is partly subscribed, *and with the obligation on my part to give three million acres while I only have* 1,000,000. * * * We must therefore without loss of time contract for the million of Mess. Kneeland, and Morrison for 75 cents, and then procure the other 2,000,000 at 50 cents, and then send me a dispatch immediately when you have learned of the existence of these lands, otherwise I will not only have worked for nothing, but incur great loss of money and credit. ~~He~~ not let be known the object of Mr. Scott's visit, otherwise you will meet with other difficulties more serious. And do not let Mr. Scott know our present position, in order not to fall into ridicule. First, let him visit those lands we have, then those of Kneeland. On general principles, avoid his communicating with landowners, as I have told him myself, in order to avoid their increasing their terms and rendering our operations more difficult. * * * You must also conceal the facts as to the payments for the lands. It is useless for him to know whether they are paid for or not, or the true price. Accompany him at all times, and procure the most rapid means to effectuate the inspection in the briefest possible time, if however you find the lands. (Record, p. 39.)

Again, he wrote to the same agent on the 13th of October, as follows:

"You will learn from Mr. Scott what extraordinary movement there is these Texas lands and cattle among many lords and English capitalists.

"If on your arrival in the El Paso, you do not find lands, the trade will be entirely lost. What is

wanted, (I repeat for the millionth time,) is 3,000,000 acres of land, either in El Paso, or Presidio, or Peaos, or Tom Green—in fact wherever to be found, in order not to cut a sorry face.

"We must not lose these moments which are precious. Work night and day, for we must succeed at whatever cost. Do not lose sight of the 1,200,000 acre trade before the English Expeditions arrive at El Paso. In order to do things properly have the documents drawn by some lawyer, whom you will readily find at El Paso. The profit, (Commission, bons, advance) of 25c. to be paid for transfer of the contract (file location), cannot be paid until after an inspection of the lands to be made by an expert, whom I will send from here. They must not know that my expert is Scott. In this way we will have nearly a month's time. I will then have formed the syndicate and be in a position to pay. I hope you have well understood this very convenient arrangement. (Record, p. 41).

On the 27th of October, 1882, Telfener writes to Scott as follows :

"I received this morning Prof. Scott's very unfavorable report on the Kneeland lands. It seems there are only 750,000 acres of good grazing land, but to get water $20,000 to $30,000 would have to be spent in making tanks. Well, while I have telegraphed you to give Bacarisse instructions to find another 1,500,000 of acres, still I think that Kneeland's 750,000 acres could be utilized, charging him with the expense of water where Scott will indicate. * * * Use every energy to obtain large quantities of land." (Record, pp. 41, 42.)

On the 27th of October, 1882, Telfener telegraphed to Westcott as follows:

"Give at once instructions Bacarisse to procure three million more because Kneeland land not suitable. Say

nothing to owners because I want to remain bound. Nor should Scott give his opinion. Have other land visited at once, as I have here the complete combination ready. It might do to take the good portions of Kneeland, he building tanks." (Record, p. 105.)

On November 10th, Telfener wrote to Westcott as follows:

"We must take advantage of my voyage, which will last one month in London, to complete with every energy all affairs. Until now expenses and risks have been my share. If the El Passo undertaking does not succeed I will lose all I have spent, and I will have to satisfy the owners, who might not want to sign the contracts, and not force them, because if the trade falls through, in addition to the expenses, I will have serious lawsuits with Messrs. Kneeland and Russ." (Record, p. 43.)

"On the 19th of December, 1882, Telfener, being then in London, wrote to Wescott upon this subject as follows:

"EL PASO. As I told you in former letters, difficulties continue here, and I doubt if I can do much the balance of this month. Keep of the friendliest relations with Kneedland, Raux (*Russ*) & Co." (Record, p. 44.)

COMMUNICATIONS FROM THE DEFENDANT TELFENER, CONFERRING UPON BAGARISSE AUTHORITY TO ACT FOR HIM IN THE MAKING AND SIGNING THE CONTRACT WITH RUSS.

On the 16th of September, 1882, the defendant Telfener gave to Bacarisse a letter of introduction to Peeler and Maxey, attorneys at law, at Austin, Texas, in which he says:

"The present is to introduce to you my agent, Mr. Chas. Bacarisse, who visits your city on business connected with land, &c.

Any advise or assistance to further him in his mission you may extend to him, should he need it will be gratefully acknowledged." (Record, pp. 52, 53.

On the 15th of November, 1882, Telfener telegraphed to Bacarisse, as follows:

"Great mistake committed to leave without money, telegraph Victoria, have take money from there and start for Stockton, and take everything you can lead hands of up to two millions." (Record, p. 55.)

On the 16th of October, 1882, Telfener telegraphed to Bacarisse as follows:

"Look up actively for large bodies of land either from the State *or from private individuals*, and Thursday be at El Paso to meet Westcott." (Record, p. 56.)

COMMUNICATIONS FROM WESTCOTT TO BACARISSE.

On October 25th, 1882, Westcott, being at El Paso, telegraphed to Bacarisse as follows:

"Provided there is at least one million, close at eighty, General to undertake survey and perfect things for issuance patent funds for commencing surveys shall be deposited immediately. Expects favorable report and certified papers reach Count say within time specified by you, commission to be paid on certificate from land office that filed-notes are returned and patent will issue in Bosses name, he will pay State direct. Sign contract to mail or express certified copy file and map in duplicate impossible this will save much time and enable inspection

probably in six days look up Presidio and Pecos affairs mailing certified papers and maps before you leave." (Record, p. 56.)

On the 27th of October, 1882, Westcott telegraphed to Bacarisse as follows:

"Yours 25th was answered immediately, why did you not wait after asking a reply, knowing the thing to be so important? Go back and close at eighty, as instructed." (Record, p. 56.)

On the 24th of October, 1882, Bacarisse being at Dallas, Texas, telegraphed to defendant Telfener in New York, as follows:

"The General holds firm on one dollar on his million acres if he is to deliver patent; but is open to an offer for margin payable cash above fifty cents if he transfers his file to you or annuls his file so as application can be entered in your name. He wishes offer also for contract of survey and obtaining patent; have advised Westcott and await answer." (Record, p. 57.)

On the 31st of October, 1882, Bacarisse telegraphed to Westcott as follows:

"General says land offices certify that field notes are correct and patent will issue amounts to delivery of patent, while his proposition is twenty five cents, payable upon transferring his files, which would place the Count where the General stands now for securing patent—then separate and distinct contract for surveying, filing field-notes, &c., at five cents per acre, transfer of files to be made after verifying correctness of same with county surveyor and land-office records; but understand that this does not entitle us to a certificate that patents will issue, the time employed in examining the files and maps of Ysleta and

Austin can be utilized for experts inspection and report when contract will be ratified; please be explicit if I can close on these terms, and quick, as General is likely to slip off at any moment." (Record, p. 60.)

On the 1st of November, 1882, Westcott telegraphed to Bacarisse as follows:

"Accept General's offer at twenty-five cents for transfer his file, same to be made as suggested by him after verifying correctness of same with county surveyor and land-office record, send immediately certified copies of file, map and contract." (Record, p. 60.)

On the 1st of November, 1882, Bacarisse telegraphed to Westcott, and also to the defendant Telefener, as follows:

"Your message and confirmation copy received. Have closed with General subject to making good his file which he agrees to satisfy us on before being entitled to payment. We are now drawing up agreement to sign. General demands that I accompany him to Ysleta, where maps and files can be copied, certified to and verified before going to Austin to compare with land-office record. He has not the files nor the maps here, Duncan having taken them away. I will start with General to-night provided I do not get instructions from you, as he makes it a condition to signing agreement. Wire quick if satisfactory." (Record, pp. 67, 82, 83.)

On the 2d of November, 1882, Bacarisse telegraphed to Westcott as follows:

"Your message and confirmation copy accompanying transfer file subject to verification of same rec'd; have closed with General, he agreeing to satisfy us upon his files before being entitled to payment. We are now drawing contract to sign. General demands

that I accompany him to Ysleta where, unless you instruct differently before train leaves, as General makes it condition for signing contract now that I go with him. If it is satisfactory wire quick." (Record, p. 60.)

On the same date Westcott telegraphed to Bacarisse as follows:

"Come on with General, will meet you at Ysleta." (Record, p. 60.)

On October 28th, 1882, Westcott telegraphed to Bacarisse as follows:

"You never got my message of twenty-fifth, because you did not wait for it. If you have received recent orders from Count not to close at eighty wire me, if not close at eighty, General to undertake surveys and make everything straight for issuance of patents. Funds for commencing surveys shall be deposited immediately after expert's favorable report reaches Count, say within time specified by you. Commission paid on receipt of certificate from land office, the field-notes are begot and patents will be issued. Count will pay State direct, sign contract and mail or express certified copy of file and map; this will save much time and enable to have land inspected probably within five or six days." (Record, p. 104.)

On the 30th day of October, 1882, Bacarisse telegraphed to Westcott as follows:

"General says he accepts on basis of my message of twenty-fifth; that is, twenty-five cents payable when transfers of files in Count's name are made. Said transfer to take effect after examination of files & maps in general land & county surveyor's office, say within ten or fifteen days after ratification of the agreement, to allow time for expert's reports files to be either transferres or forfeiture enter to allow filing of Count's application fifty cents to State payable of

course direct when due. General further takes contract of five cents for surveys, filing field-notes & doing necessary for prompt issuance patents, but he holds to one dollar if he is to deliver patents before payment. Answer immediately as he is called at Austin to close other offer." (Record, p. 76.)

There was other evidence upon this question submitted to the jury, which was contained in the testimony of Bacarisse, of the plaintiff Russ, and the defendant Telfener. It has not been specifically referred to here, but it shows that Bacarisse was in almost daily correspondence with Westcott and with Telfener during the time which elapsed between the date when Telfener introduced Baccarisse to Peeler and Maxey as his agent, "on business connected with lands," until the time when the contract was signed, and the defendant Telfener informed of its terms by a telegram transmitted to him in New York, on the 1st of November, 1882. It is nowhere shown that there was any suggestion or instruction to these agents of this Italian adventurer to limit his agents in their acquisition of large tracts of land in his name, to deal only in *options* for the purchase of real estate, which should become binding only at the pleasure of the buyer. It was not until this inflated bubble had burst, and the visions of untold millions was fading from his sight and eluding his grasp that it occurred to the defendant that he was only a dealer in "*options*" and not realties.

The evidence shows that the plaintiff absolutely, and at all times, refused to make any sale of his right to become the purchaser of the lands mentioned in his contract, that should be depended upon any conditions not specified in the contract. (Record, pp. 74, 75, 107.)

The evidence upon this question was submitted to the jury, with the following charge as to its force and effect, in establishing the liability of the defendant Telfener upon the contract made with the plaintiff Russ by Bacarisse, to wit:

"The contracts, as you see, does not purport to have been signed by the defendant in person, but are signed by one who signed the same as the agent of the defendant.

"The defendant denies that the contract binds him, as the same is not his act and deed, because the party signing his name had no authority to make a contract for him or binding upon him.

"This presents the first question for your consideration. Does the evidence satisfy your minds that when the contract in evidence called Exhibit M was signed that the person who signed it as the agent of defendant had at that time authority from defendant to enter into such a contract with plaintiff Russ?

"If you shall find that he had such authority, then you will proceed to consider the other questions involved in the case.

"If from the evidence you shall find that the person who signed the contract as the agent of defendant and who signed defendant's name thereto had no authority to do so, then you will proceed to enquire from the evidence whether the defendant, after being made acquainted with the contract, acquiesced in and recognized the same as his contract and acted upon the theory that he had secured by this contract the right to be subrogated to all the rights of plaintiff to become the purchaser of the lands mentioned in case the facts existed which are specified in said contract in relation to what plaintiff asserted he had done in the premises in order to secure a right to become the purchaser of the lands. If so, then it would amount to what in law is called a ratification of the contract, and would, in that event, be as binding upon

the defendant as though he had given authority to make the contract before the same was executed.

"If you shall find from the evidence that defendant authorized Westcott, Botario, and others, among whom was Bacarisse, he, Bacarisse, acting under direct authority from defendant, or under Westcott, with the knowledge of the defendant, and that these parties were authorized to procure lands for the defendant directly from the State by filing upon them and having same surveyed for defendant; and, further, if necessary to secure the desired amount, to contract for the same, as was done in this instance, and in the manner adopted with the plaintiff, then I charge you that the acts of these parties bind the defendant, as these acts come within the scope of such authority, and defendant cannot avoid liability thus created, notwithstanding he gave private instructions not to purchase without referring the matter to him for his ratification, provided that this instruction was not known to the plaintiff. Otherwise, however, if the plaintiff knew that the agents were instructed not to close any trade without first referring the matter to him (defendant) then plaintiff could not enforce a contract made with an agent thus instructed without complying with such restriction." (Record, pp. 10, 11.)

This Court is not authorized to review or set aside on writ of error the finding of the jury upon the question of fact thus submitted. The court will not enter upon any inquiry which requires it to assume the place, and discharge the duties of a jury. The inquiry here is in regard to the correctness of the decisions of the Circuit Court upon questions of law.

Parsons vs. *Bedford et al*, 3 Pet., 435, 447;
Hepburn vs. *Dubois*, 12 Ibid, 345;
Hyde vs. *Booream*, 16 Ibid, 169;

Miner vs. *Tillotson*, 2 How., 392;
Gregg vs. *Moss*, 14 Wall., 565.

The only questions of law that can be considered here in connection with the finding of the jury upon the questions of fact submitted to it relate to the decisions of the Circuit Court, upon the admission or exclusion of testimony offered at the trial, which decisions were excepted to at the proper time, and the exception shown in the record. And this court will not set aside the verdict of the jury, even if the Circuit Court did err in the admission or exclusion of testimony, if it appears from the record that any evidence not excepted to was submitted to the jury upon the questions submitted to its determination.

The finding of the jury upon the questions of fact involved in determining the authority of the agents of the defendant Telfener to make contracts in his name, for the acquisition of large tracts of land in the State of Texas, by purchase from the State, or from individuals, or to make the contract under consideration here, could not be affected by the admission or exclusion of the evidence offered at the trial in the Circuit Court and there excepted to by the defendant Telfener.

b. There was no error in the decisions of the Circuit Court admitting or excluding testimony offered at the trial.

An examination of the several exceptions taken by the defendant, and preserved in the record, will establish the correctness of this proposition. The defendant Telfener at the trial reserved *seven*

exceptions to the admission of evidence offered by the plaintiff Russ, and *twelve* exceptions to the rulings of the Circuit Court in the rejection of and exclusion from the jury of evidence offered in behalf of the defendant Telfener, and objected to on behalf of the plaintiff Russ. There was no error committed by the Circuit Court in the decisions excepted to, as shown in the record; and an examination of the several exceptions taken at the trial, and the grounds upon which they were based, will demonstrate the correctness of this proposition.

The *first* exception is to the admission in evidence of the report of John Scott made to the defendant Telfener on the 16th of November, 1882, and the prospectus of "the Rio Grande Cattle Ranche and Land Company, Limited," dated December 14th, 1882. These documents were offered as evidence tending to prove the ratification of the contract made by Bacarisse, as agent of Telfener, with the plaintiff Russ. These papers had been prepared and put in circulation by the defendant Telfener, and they prove, or had the tendency to prove, that subsequent to the 1st day of November, 1882, the defendant Telfener had dealt with the land which he had acquired the right to purchase under his contract with the plaintiff, as his own. These documents were, therefore, clearly admissible for the purpose of proving that fact, and as tending to show a ratification by the defendant Telfener of the contract made in his name by Bacarisse with the plaintiff. (Record, pp. 45 to 52.)

The *second* exception was to the admission of the telegram from defendant Telfener to Bacarisse, dated "New York, 11th," but in fact dated New York,

October 11th, 1882. The witness to whom the telegram was addressed testifies in regard to it as follows:

"That the telegram was received from Count Telfener by him when witness was at Fort Davis, filing applications for land for him. He stated that the telegram was an original on the War Department blanks at Fort Davis and was handed to witness by the operator of the War Department on the Government line at Fort Davis; and that it was a telegram delivered by the military office to the witness at Fort Davis."

The proof to entitle this telegram to admission as evidence, and the telegram itself are found in pages 53 and 54 of the record, and are sufficient to authorize the said telegram to be offered in evidence; and the telegram itself, shows that the defendant Telfener was then communicating with Bacarisse with special reference to the acquisition of land."

The *third* exception is to the admission in evidence of the two telegrams sent by Wescott to Bacarisse, and dated October 25th and 27th, 1882.

These telegrams were and are admissible because it had been shown in previous letters transmitted by the defendant Telfener to Westcott, that Westcott was directed to purchase for and in the name of Count Telfener *at least three million acres of land* in El Paso and adjourning counties in the State of Texas, and that Bacarisse had been directed by the defendant Telfener to assist Westcott in securing these lands. The letters already quoted and found in the record from pages 36 to 43 establish these facts.

The *fourth* exception is to the admission in evidence of the telegram dated Dallas, October 24, 1882, and sent to the defendant Telfener by Bacarisse.

The witness testified in regard to this telegram that it was a copy of a telegram that he sent to the defendant Telfener on the 24th of October, 1882, from Dallas, Texas. That he made the copy of the whole series of telegrams that he had sent to defendant Telfener. That when he sent a telegram he had a pad memorandum book and kept a copy on the pad, and from that memorandum the copy offered in evidence was made; and that the original memoranda or copies of telegrams sent by him to the defendant Telfener cannot be found, and that he supposes they were lost in the Galveston fire; and that his books and telegrams, and everything he had in his house in Galveston, were burned, and that the copy offered in evidence, with others, were made and ready to accompany him to Austin, and he had them in his office in a valise that the originals were burned; and that he verified the copies with the original personally as they were made before packing them. (Record, pp. 57, 58, 59.)

This was sufficient preliminary proof to entitle the telegram to be offered in evidence to the jury, and the telegram itself is material evidence as showing that the defendant was informed at that time of the negotiations that were being carried on between his agent Bacarisse and the plaintiff Russ.

The *fifth* exception is directed against the admission of the telegrams printed on pages 60 and 61 of the record, being telegrams sent from Bacarisse to Wescott, from Wescott to Bacarisse, and from Bacarisse to Russ, and dated October 31st, October 28th, November 1st, and November 2d, 1882. The objection to the admission of these telegrams was based

upon the assumption that the letters and telegrams that had been transmitted by the defendant Telfener to Wescott and Bacarisse showed "no sufficient authority in either Bacarisse or Wescott to bind defendant by absolute contract for the purchase of plaintiff's files and applications."

There was no error in the decision of the Circuit Court in overruling this objection, because the evidence previously offered did show that Wescott and Bacarisse had general authority from him to acquire from the State by filing thereon under the act of July 14, 1879, or by purchasing from private parties *not less than three millions of acres of land*, and the evidence in the record at the time these telegrams were offered did not show that the defendant Telfener had imposed upon these agents any restrictions or given them any special instructions in regard to the acquisition of these lands, which deprived them, or either of them, of the power to make, or to authorize to be made, the contracts marked "Exhibits M and N" in the plaintiff's declaration.

The *sixth* exception is directed against the admission of the testimony of the witness Bacarisse, commencing at the eighth paragraph on page 68 of the record, and ending on page 69. The ground of objection was that the testimony, if admitted, was immaterial. The testimony was material in that it showed at that time, December 25 and 26, 1882, the defendant Telfener was not objecting to the contract made by Barcarisse as his agent with the plaintiff, or that he at that time denied or questioned the authority of Bacarisse to make that contract for him. All that the defendant Telfener desired to do, as

shown by this testimony, was that the contract of November 1st, 1882, should be so modified so that the twenty-five cents an acre which he had agreed to pay to the plaintiff Russ, should be payable fifteen cents in cash and ten cents in the stock of some company the defendant Telfener was then organizing. There was no error in the admission of this testimony, because it tended to show that the defendant Telfener at that time recognized the binding effect of the contracts made by Bacarisse in his name with the plaintiff Russ.

The *seventh* exception is directed against the admission of the testimony of the witness Bacarisse, found on page 70 of the record. The testimony objected to was as follows:

"I went to Victoria and had an interview with Telfener; the interview was a conference in regard to the Russ contract We had a friendly conference about it. He had no complaint at all at me for having transcended my authority. Count Telfener wanted me to interfere with General Russ, and see how that suit could be taken out of court. He asked me to find a reason with General Russ; that he had been a great loser in not being able to organize his great land syndicate, and that he was willing to pay a certain amount to compensate their trouble."

The objection urged against the admission of this testimony is that it related to a conversation of the mutual friend of both parties pertaining to a compromise of the differences. There was nothing disclosed in connection with this testimony that would justify the suggestion that the witness visited the defendant Telfener for the purpose of compromising

this suit or that he had any authority to compromise it from the plaintiff Russ.

The facts stated by the witness that the defendant said that he had been a great loser, in not being able to organize his great land syndicate, and that he was willing to pay a certain amount "to compensate their trouble," were statements which tended to show that he recognized his obligation under the contracts made by the witness with the plaintiff Russ, and that he was giving excuses for the non-performance of the said contracts; and these declarations of the defendant Telfener, for that reason, were admissible for the purpose of aiding the jury in determining whether the defendant Telfener recognized the contracts made by the witness with the plaintiff, in behalf of the defendant Telfener, on the 1st day of November, 1882.

The *eighth* exception was directed against the rejection as evidence of a telegram sent by Bacarissa to Botari on the 15th of November, 1882.

The objection to this letter was made because it was a communication between the witness and a third party, and the plaintiff Russ was therefore not bound by any of the statements contained in it. This testimony was properly excluded from the jury.

The *ninth* exception was taken to the exclusion from the jury of the letter dated November 16th, 1882, and written by Westcott to the defendant Telfener, then in London. (Record, pp. 77 and 78.)

The objection to the admission of this letter was based upon the fact that it was written after the rights of the plaintiff under his contract had been fixed by reason of the default of the defendant

Telfener in the performance of his obligation under said contracts.

It is too clear for argument that the rights of the plaintiff Russ, under said contracts, could not be impaired or affected by the declaration of an agent of the defendent Telfener to which the plaintiff Russ did not assent.

The *tenth* exception is based upon the exclusion from the jury of the fifth interrogatory and the answer thereto, in the deposition of the defendant Telfener, taken at Rome, Italy, on the 15th day of July, 1883.

The interrogatory objected to and the answer thereto are found on pages 85 and 86 of the record, and were properly excluded from the jury, for the following sufficient reasons:

First, that it was an attempt to get before the jury a declaration by the defendant Telfener as to the legal force and effect of the written authority that he had given to his agents Westcott and Bacarisse in the months of September and October, 1882.

Second, because the construction of the written evidence of authority in the letters transmitted by the defendant Telfener to his agents Westcott and Bacarisse, was a question of law to be determined by the Court; and the plaintiff Russ could not be concluded, nor his rights effected, by the construction put upon said letters and telegrams by the defendant Telfener.

The *eleventh* exception is to the exclusion from the jury of the sixth interrogatory and the answer thereto in the same deposition, on pages 86 and 87 of the record.

This interrogatory and the answer thereto were properly excluded from the jury, for the reasons stated as grounds for the exclusion of the testimony included in the fifth exception.

The *twelfth* exception is directed against the exclusion of the telegram sent by Westcott to the defendant Telfener on the 19th of December, 1882, and marked Exhibit F Bis. (Record, pp. 91 and 92.)

The *thirteenth* exception, was directed against the exclusion from the jury of the seventh interrogatory, and the answer thereto in the same deposition (Record, pages 87 and 83).

This interrogatory and the answer to it were properly excluded from the jury, because it sought to conclude the plaintiff by declarations made by him subsequent to the time when the rights of the plaintiff Russ under said contract became fixed and determined; and it was also an effort on the part of the defendant Telfener to give a construction to the legal effect of written documents, letters, and telegrams signed by him or by his agents before and subsequent to the date of making said contracts.

The *fourteenth* exception was directed against the exclusion from the jury of the ninth interrogatory and the answer thereto in the same deposition. (Record, pp. 92 and 93).

This evidence was properly excluded from the jury, because it sought to obtain from the defendant Telfener *his* construction of letters and telegrams which are not produced or shown, and it sought to bring to the attention of the jury matters and facts which transpired subsequent to the 15th of November, 1882,

when the rights of the plaintiff Russ under these contracts had become fixed and could not be affected by any letters or telegrams written by him to his agents.

The *fifteenth* exception, is directed against the exclusion as evidence, of the twelfth interrogatory and the answer of the defendant Telfener, thereto, in the same deposition. (Record, p. 94).

This interrogatory and the answer to it, were properly excluded from the jury, because the statements contained in it could not be admitted to either affect the rights of the plaintiff Russ, under said contracts, or to limit or restrict or construe the authority given by the defendant Telfener, to his agents Westcott and Bacarisse, previous to November 1st, 1882.

The *sixteenth* exception is directed against the exclusion as evidence, of the thirteenth interrogatory and the answer thereto of the defendant Telfener, in the same deposition. (Record, pp. 95 and 96).

This evidence was properly excluded from the jury because it sought to obtain from the defendant an expression of the purpose and object he had in writing a letter marked exhibit B, which is not produced or anywhere shown in the record; and for a construction by the defendant Telfener, of the legal force and effect of certain written or printed documents which are in evidence, and shown to have emenated from the defendant Telfener, or from persons authorized to act in his behalf.

The *seventeenth* exception is directed against the exclusion from the jury of the twentieth interrogatory (erroneously marked interrogatory 21) and the

answer thereto in the same deposition. (Record, pp. 97 and 98.)

This evidence was properly excluded from the jury, because it sought to permit the defendant Telfener, to give a construction to the legal force and effect of the written instructions contained in letters and telegrams that he had sent to his agents Westcott, and Bacarisse, previous to the date of making the contracts embraced in this suit, which letters and telegrams were in writing and in evidence in this suit.

The *eighteenth* exception is directed against the exclusion from the jury of a part of the answer of the defendant Telfener to the second cross-interrogatory propounded to him, by the plaintiff Russ. (Record, p. 99.)

That part of the answer to said cross interrogatory objected to by the plaintiff Russ, and excluded from the jury, was properly excluded; because the defendant Telfener, after he had answered said cross interrogatory, volunteered a statement not called for by the cross interrogatory, and attempted by the statement not required by said cross interrogatory, to give a construction of the written authority that he had conferred upon his agents Westcott and Bacarisse, by means of letters and telegrams, which were in evidence and in writing.

The *nineteenth* exception is taken to the exclusion from the jury of the question propounded to the witness D. N. Robinson, and the answer to said question contained on page 103.

It was immaterial to the rights of the plaintiff, as to whether the certificates of entry or of filing and

survey of lands which could be purchased under the provisions of the act of July 14th, 1879, was recorded at the land office as returned in time, or within sixty days from the date of said surveys; nor is it material how said certificates were regarded by the Genenal Land Office of the State of Texas, because there is no provision in the act of July 14th, 1879, which makes the non-return of the survey, or the certificate thereof, and the map and field-notes of the land embraced in it, within sixty days from the date of the completion of said survey a cause of forfeiture of the right to purchase said land.

The court upon a consideration of these exceptions must conclude that no evidence was submitted to the jury, and none excluded from its consideration, which could have affected the conclusion at which the jury arrived upon the question as to whether Bacarisse, as agent for the defendant Telfener, had the right in the name of the defendant Telfener, to make the contracts entered into with the plaintiff Russ.

B. The consideration for the contract, entered into between the plaintiff Russ and the defendant Telfener, was a promise or agreement made by plaintiff Russ to sell, assign and transfer to the defendant Telfener a vested right to purchase and acquire certain lands in El Paso County, in the State of Texas, which lands the plaintiff Russ had acquired the right to purchase; and the promise of the plaintiff Russ to sell, assign, and transfer that right to the defendant Telfener was a valuable and sufficient consideration for the contract.

It will be useful to quote here so much of that contract as states with exactness what the plaintiff Russ agreed to sell, assign, and transfer to the defendant Telfener, and the consideration or amount which the defendant Telfener agreed to pay for the sale, assignment and transfer of the "rights, titles, and interest", which he, the defendant Telfener, desired to purchase from the plaintiff Russ.

The contract, in its recital, states with unmistakable clearness, and in exact terms, the "rights, titles, and interest," which the defendant Telfener desired to purchase, and which the plaintiff Russ proposed to sell, transfer, and assign, in the following language :

"Whereas said Russ claims to have made application for the purchase of about one million acres of land, more or less, in El Paso County, Texas, from the State of Texas, under and by virtue of an act of the legislature of Texas, approved July 14th, 1879, providing for a sale of a portion of the public lands of Texas, at fifty cents per acre, and the amendment to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso County, at Ysleta ; and whereas the said Count Telfener, is desirous of purchasing from said Russ all his rights, titles and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the State of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ

has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his said application and files."

It is averred in the *third* plea of the defendant Telfener—

"That there was not, at the time of making the alleged contract in plaintiff's petition mentioned, any legal right on the part of plaintiff to file or locate upon or acquire by purchase or otherwise any right, title, estate or interest in and to the files, locations and land in said petition mentioned, and the sale thereof by plaintiff to defendant was illegal and void and without any consideration whatever." (Record, p. 20.)

And the defendant Telfener further averred in an amended answer, or plea filed by him, as follows:

"That the said contract or contracts exhibited with the plaintiff's petition were without any consideration, or if there was any valid consideration therefor that said consideration has failed, in this, that the law which permitted the purchase of the lands in said petition mentioned, was repealed before the steps required thereby to obtain title or any vested interest therein could have been or were taken, and that by reason of the failure of the plaintiff to acquire a valid subsisting interest and right in and to said lands before the repeal of said law all right, if any, which defendant acquired or could have acquired under said contracts, was wholly lost to defendant, and defendant further says in this connection that even if he had complied with said contract he could not have obtained patents and the same would have been wholly lost to him." (Record, p. 22.)

The plaintiff in error, for the purpose of enabling him to present this question for review here, excepted

to so much of the charge of the circuit court as is here quoted, to wit:

"The point is made that plaintiff had no assignable interest. I do not assent to this proposition. But if this were the rule, when nothing but an application has been filed, the Supreme Court of the State has decided that after survey a right does attach which cannot be divested by adverse legislation. In that event, therefore, as I have said, all the surveys claimed except those mentioned were made before the 1st day of November, 1882, the date of the contract of sale." (Record, p. 116.)

The application for the purchase of these lands, by the plaintiff Russ, was made to the surveyor of El Paso County, Texas, on the 4th and 5th days of October, 1882, and the survey of the land embraced in said application to purchase, was completed on the 9th day of November, 1882.

The field-notes, and maps, which were required to be made by the surveyor subsequent to the application to purchase said land designated in the application to purchase was required to be made by the surveyor, within three months from the date of such application. The survey of the lands included in the plaintiff's application was completed on the 9th day of November, 1882. The surveyor to whom said applications to purchase had been made was required *within sixty days* after the completion of said survey, to certify to, record and map the field notes of said surveys; and he was also required within the said sixty days to return to and file the said map and field-notes in the General Land Office of the State of Texas.

The map and field-notes of the survey of the lands

embraced in the applications of the plaintiff Russ were filed in the General Land Office, as required by the statute, authorizing the purchase of these lands on the 8th day of January, 1883. This was within sixty days from the completion of the survey of the lands included in said application.

The making of this application to purchase, and the completion of the surveys of the land embraced in said application, conferred upon and vested in the plaintiff Russ an absolute right to purchase the lands included in his application. This right to purchase was *a vested right*, and was not nor could it be divested, by a repeal of the act of July 14th, 1879, under the provisions of which the applications to purchase said lands and the survey and map and field-notes thereof had been procured to be made by the plaintiff Russ, before the repeal of said act.

This question has been so clearly decided by the Supreme Court of the State of Texas, that it needs no discussion here.

The decisions of that court in the following cases are conclusive of that question:

In the case of *White* vs. *Martin*, 66 Texas, pp. 340, 342, the question as to the effect of the repeal of the act of July 14, 1879, upon the right of an applicant to pay for and acquire said lands, which had been applied for and surveyed before the repeal of said act, was considered and decided; and, in deciding the questions there involved, that court used the following language:

"The appellee believing the land to be vacant, made application to the proper surveyor on Novem-

ber 23, 1882, to survey the land for him, under the act of July 14, 1879, and the act of March 11, 1881, amendatory of the former act, and in accordance with his application the land was surveyed on December 21, 1882. The field-notes of this survey were filed in the general land office on January 30, 1883, and March 27 following he paid to the State treasurer the full price of the land made necessary by the act under which he sought to purchase."

"In *Campbell* vs. *Blanchard*, decided at the last term of this court, and in the *State of Texas* vs. *Work*, 63 Tex., 145, it was held that persons who had done nothing more than to make application for surveys prior to the act of January 22, 1883, which withdrew from sale the land put on sale by the act of July 14, 1879, and the amendment thereto, had no vested right to the lands which they sought to purchase. This is evident from a consideration of the act itself; and persons claiming rights under it must show that they had done such acts as, in connection with the law, entitled them to the land. If the act of July 14, 1879, be considered as a proposition made by the owner of land to sell to whomsoever might desire to buy, then it is certain that one desiring to become a purchaser would have to comply with the terms upon which the owner proposes to sell, before he could acquire any right."

"The first step to be taken under the act by one desiring to buy was an application to survey the land desired. This application had to be made to the surveyor of the county in which the land was situated. This application, however, conferred on the applicant no absolute right to have a survey made, for it was only when such applications were made by responsible parties that the law made it the duty of the surveyor to make such surveys. Who was to judge whether the applicant was a responsible person? Certainly the surveyor, at least in the first instance; and there were good reasons, when we look to the whole act, why the right to have a survey made was

made to depend on the responsibility of the applicant."

"The land embraced in the act was open to pre-emption, as well as to sale, and it was the policy of the State not to withdraw the land from appropriation, to homestead claims upon the mere application of speculators who, if a mere application to purchase would operate to withdraw it from such appropriation might apply for land which they neither intended nor had the ability to purchase, and so, for the purpose of speculating on those who desired to become actual settlers, a class always favored by the laws of this state providing for the disposition of its vacant public domain."

"The act itself indicates a desire to raise money by sale, and if a mere application to purchase could have the effect to withdraw it from sale, for any period of time, that purpose could be defeated for a time for speculative purposes by applications made by those who neither intended nor were able to buy. The whole act shows that an application was not intended to affect the right of the state to sell to any person who might take the steps necessary to buy the land, or to grant it to an actual settler."

"If the applicant be deemed or even declared a responsible person, still the statute does not declare that the application shall operate as a purchase. Until there is a purchase, there can be no right which the law recognizes. The application to buy or to have surveyed, may be regular, the surveyor satisfied of the responsibility of the applicant, and ready to make the survey, but when this point has been reached, they have only arrived at that stage of the negotiation and discharge of duty by the surveyor which authorizes him to do the act *which the law declares shall operate as a purchase*. The surveyor, then, has the power, but until it is exercised by doing the very act which the law declares shall operate as a purchase, his will, combined with the will of the applicant, can no more operate as a sale or purchase, than

can the willingness of an attorney, acting under a power which provides the manner in which it shall be exercised, coupled with the express desire of the purchaser to buy at fixed terms, operate as a sale, until the sale is consummated by the exercise of the power in the mode and manner provided."

"How may the applicant become a purchaser? The statute answers the question. He "may do so by causing the tract or tracts which such person, firm or corporation desires to purchase to be surveyed." When this is done as the act contemplates, then and not before the State contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed. When this point was reached there existed an executory contract which gave the purchaser a vested right upon complying with his part of the contract to have the land purchased, of which subsequent legislation cannot deprive him."

In the case of "The Jumbo Cattle Company," 79 Texas, pp. 5, 12, 13, this question again came before the Supreme Court of that State, and the principles declared in the above case were again asserted in the following language:

"The question, then, is as to the effect of the act of January 22, 1883, which repealed the acts under which appellees made application to purchase the lands. The application had been made and the land had been surveyed when the repealing act took effect. Had the appellees acquired a vested right which the Legislature could not take away? Or, at the time the act last referred to went into operation, was there existing between the State and the appellee a contract which the State could not impair by a repeal of the law under which it was consummated? The ruling in *White* vs. *Martin*, 66 Texas, 340, is decisive of the question. The only difference between that case and the case now before us, is that

in the former the purchase money (which was not tendered until after the repealing act took effect) was received by the State treasurer. In the present case the treasurer refused the tender. It is too plain for argument that the action of the treasurer could not affect the rights of the parties. If the purchaser's right to acquire the land was taken away by the repeal of the law which authorized the sale, the treasurer could not conclude the State. He acted without authority, and his act was void. So if, notwithstanding the repeal, the purchaser still had the right to complete his purchase by a compliance with the terms of the laws under which his application and surveys had been made, the treasurer could not defeat that right by refusing to receive the money."

"In the case cited it was held there was a vested right which was not destroyed by the repealing act. The cases previously decided were discussed in the opinion, and were shown to be in harmony with the conclusion reached."

"In *Coleman* vs. *Lord*, 72 Texas, 288, since decided, it was held in effect that when the Land Board rejected a bid for the lease of the school lands, no contract was consummated, although the bidder had complied with the law in making the bid. The decision was placed upon the ground that the board had been constituted agents of the State to lease the lands, and that until they had accepted a bid there was no contract, although they may have violated their duty in rejecting it. That ruling is in strict accordance with the principles in *White* vs. *Martin*, *supra*. It was then held that the statute which authorized a sale of the land conferred upon the surveyor the right to pass upon the responsibility of the appellant and to reject the application, and that until the application was received by him and the survey made no vested right was acquired."

In so far as mere property rights are concerned we see no difference between the contract of a State and

and an individual, and a contract between two individuals. The formalities by which they are entered into may be different, but the principles affecting the two are essentially the same. When there is an offer made by an act of the legislature which is accepted by an individual there is a contract which it is not in the power of the State to impair. After an acceptance a repeal of the law can not affect the contract, but until an acceptance a repeal of the act withdraws the offer and no contract can be made. By the act of July 14, 1879, the State offered to sell the land to any responsible person who would make application for it and cause it to be surveyed. The appellees had accepted the terms by making application and procuring the surveys before the act was repealed. The contract was complete and could not be impaired by the subsequent legislation which repealed the act. The expense of the surveys, in connection with the price to be paid to perfect the title, are a sufficient consideration to support the contract. It cannot be treated as a mere bounty or gratuity on part of the estate.

The case of *Campbell* vs. *Wade*, 132 U. S., 34, 37, does not in any respect affect the principles so forcibly stated in the cases above cited; because, in that case, there had only been *an application to purchase*. There had been no survey. In the case under consideration there had been not only an application to purchase, but there had been an actual survey of the lands; and the surveyor had returned to the general land office, within the time required by law, his certificate, map, and field-notes of the survey; and that case concedes that the statute confers

the right of an applicant to purchase the land when these acts have been performed.

At this point in the performance of the acts necessary to complete the purchase, the obligation of the defendant Telfener commenced. He was to pay the money which the State required to be paid in order to complete the sale. The plaintiff Russ, when these acts were performed, had done all that could be required of him. If the sale was not completed and the right to purchase was lost, it was in consequence of the default of the defendant Telfener, and it is very clear that such default cannot be successfully urged as a defense against the losses the plaintiff Russ sustained by reason of that default.

These authorities are sufficient to establish the proposition that the plaintiff Russ, when he contracted with the defendant Telfener to sell, assign, and transfer to him his rights, titles, and interests in and to the lands included and described in his application to purchase the same from the State of Texas, had done those things which the statute required in order to vest in the plaintiff Russ a right to complete the purchase and become the owner of said lands.

This right, being completely vested in the plaintiff Russ, was a right of property, and subject to sale, assignment, and transfer by him. There is no provision in the statute authorizing the sale of said lands, which *prohibited* the sale, assignment, and transfer of that right by any person who had acquired it in the manner provided in the statute. The undertaking of the plaintiff Russ was to sell, assign and transfer to the defendant Telfener the right of

the plaintiff Russ to become the purchaser of the lands which he had made an application to purchase and had caused to be surveyed, as provided in the statute. This right to purchase lands thus acquired was a right which the plaintiff Russ had a right to sell, transfer, and assign. It was a right to acquire property—to acquire real estate—and was conferred by statute. The sale, transfer, and assignment of such a right was of sufficient consequence, and upon sufficient consideration, to make valid and binding the obligation assumed by the defendant Telfener to pay to the plaintiff Russ the amount of money specified as in the consideration for the sale, assignment, and transfer of the said rights to the defendant Telfener.

Authorities are not required to sustain propositions so obvious and elementary as those here stated.

C. The decisions of the Supreme Court of the State of Texas, to which the attention of the court has been invited in connection with the discussion of the preceding proposition are the law of the case upon the questions there decided; and the decisions of that court will be followed by this court, so far as the principles there asserted are involved in the decision of the case under consideration.

These decisions are of consequence and material to the inquiry here involved, for the following reasons:

1st. Because they assert the proposition that any person or persons who had made an application to the officer designated in the act of July 14, 1879, to receive applications for the purchase of lands from

the State of Texas in the manner provided in said statute, and who had caused the lands described or included in such application to be surveyed, had acquired *a vested right to purchase* and become the owner of the lands thus applied for and surveyed.

2d. That the *vested right* thus acquired under the provisions of said statute was not and could not be destroyed or impaired by the repeal of the statute under which such right was acquired.

It is no longer a question in regard to which there can be dispute or contention here that the *construction* given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States, as are the provisions of the statute.

Leffingwell vs. *Warren*, 2 Black., 599.
Luther vs. *Borden*, 7 How., 1–40.
Bucher vs. *Cheshire R. R. Co.*, 125 U. S., 555, 583.
Post vs. *Supervisors*, 105 Ibid, 667.
Gormley vs. *Clark*, 134 Ibid, 338–348.
Chicago Union Bank vs. *Kansas City Bank* 136 Ibid, 223, 235.

D. **There was no error in the instruction given to the jury by the Circuit Court upon the question involved in the assessment or ascertainment of the damages which the plaintiff Russ was entitled to recover, if the jury should find the issues made by the pleadings in favor of the plaintiff Russ.**

The Circuit Court upon this question charged the jury as follows:

"If, under these instructions, you shall find that the defendant is bound by the contract in evidence, and you further find that the plaintiff has a right to recover upon the same, *the measure of damages is twenty-five cents per acre on* 1,144,320 acres, if, as he claims, he had fulfilled, on his part, all that was required of him."

The exception taken to said charge, or instruction, is "Exception" No. 20. (Record, p. 115.)

This instruction was absolutely and entirely correct. It was sanctioned by those long-settled and thoroughly established principles that are everywhere and always recognized and applied in judicial proceedings in the assessment or ascertainment of those damages which result from a broken or violated contract. It is based upon the clear and undisputed principle, which declares that the rule by which the damages a party has sustained in such a case are to be measured, is the amount of money which would have been received if the contract had been kept. The loss to the plaintiff Russ in this case, is measured by the pecuniary benefit which would have accrued to him by having the contract made by him with the defendant Telfener performed.

This familiar principle is stated in Keener's Selections on Contracts, vol. 2, p. 1090, under the title "General Damage," as follows:

"In actions for breach of contract the general damage is commonly described as the *loss* sustained by the plaintiff from the non-performance of the contract. The benefit which the plaintiff would have received if the contract had been kept *is the measure of damages if the contract is broken.*"

Alder vs. *Keightley*, 15 M. & W., 117, 120.
Fletcher vs. *Taylor*, 17 C. B., 21.
Simons vs. *Patchett*, 7 E. & B., 573.

The same rule is correctly stated by Baron Parke, thus:

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same condition, with respect to damages, as if the contract had been performed."
Robinson vs. *Harman*, 1 Exch., 850, 855.

The charge of the Circuit Court was in harmony with these principles, and correctly stated the rule by which the losses sustained by the plaintiff Russ, in consequence of the failure of the defendant Telfener to perform said contract, should be measured and ascertained.

E. The *twenty second* exception presents for the consideration of the Court no question of law which justifies the reversal of the judgment of the Circuit Court.

The exception there reserved (Record, pp. 116, 117, 118) was to that part of the charge of the Circuit Court which declared—

"That the law makes it the duty of the surveyor to send up the field-notes to the General Land Office, and the presumption would be (in the absence of evidence upon that question) that the surveyor discharged his duty and sent the same up within the time."

The charge would have been entirely correct if the Circuit Court had instructed the jury that the sur-

veys made upon the application of the plaintiff Russ and the map and field-notes of said surveys *were* returned to the General Land Office within the time required by law. The certificate of the commissioner of the General Land Office (Record, pp. 102, 103, 117, 118), upon which the said exception is based, shows that the plaintiff Russ made application to purchase the lands he contracted to sell and transfer to the defendant Telfener on the 4th and 5th days of October, 1882. The law allowed three months after the making of said applications for the completion of the surveys. The survey of the lands embraced in said applications was commenced on the 13th day of October, and completed on the 9th day of November, 1882. The law required the surveyor to certify, and record, and map the field-notes in his office, and to return and file the same in the General Land Office within sixty days *from the date of completing the survey embraced in said applications*. This was all done and the surveys recorded, mapped, and filed in the General Land Office on the 8th day of January, 1883. This was within the time required by every known legal method for the computation of the time of doing those acts, which the act of July 14, 1879, required the surveyor to perform. This exception is frivolous. It is based upon the absurd proposition that the *sixty days* specified in the statute within which the surveyor was to complete his record, map, and field-notes of the lands embraced in said applications and surveyed by him and file the same in the General Land Office, commenced to run as against the surveyor, and the applicant for the purchase of said land whenever

and as soon as any part or block of the land embraced or included in the application was surveyed. This is not the law nor a rational interpretation of the requirements of said statute.

The two applications of the plaintiff Russ embraced all the lands which were surveyed between October 13th and November 9th, 1882; and their survey, map, and field-notes made but one record, or rather the record of acts done under the applications of plaintiff Russ to purchase these lands. The Supreme Court of the State of Texas declared in the case of *White* vs. *Martin*, *supra*, that the failure of the applicant for the lands applied for and surveyed to pay to the State the purchase price of said land within sixty days from the date when the record, map, and field-notes were returned to the General Land Office was the only cause of forfeiture of the right to purchase contained in the statute; and this necessarily excludes the suggestion that any forfeiture of the right to complete the purchase could result from a failure of the surveyor to send up the map and field-notes to the General Land Office within sixty days from the date of completing the surveys.

F. There is no error in that part of the charge of the Circuit Court set out in the twenty-third exception.

That exception presents for consideration no question of law.

That part of this charge of the Circuit Court thus excepted to and assailed (Record, pp. 119-120) does no more than to state the terms of the con-

tract of November 1st, 1882, the acts done by the plaintiff Russ under his application to purchase said lands, and states that the application made by Russ to purchase said land was sufficient to entitle him to go forward and secure said lands by complying with the terms of the statute. This exception is so indefinite, vague, and uncertain, and so entirely wanting in any suggestion of any legal proposition, to be considered in connection with it, as to justify the conclusion that it was not made or reserved with any expectation that it would be renewed here as affording the slightest reason for disturbing the judgment of the Circuit Court.

G. The Twenty-~~third~~ Fourth Exception must be overruled if any one of the instructions prayed on behalf of the defendant Telfener, and included in said exceptions, were bad and properly refused by the Circuit Court.

This was a general exception to the refusal of the Circuit Court to give to the jury *twenty-one* instructions requested on behalf of the defendant Telfener. The instructions prayed, as set out in the record, pp. 121, to 131, and the exception is, that "the Court declined to give each and all of the said instructions in charge to the jury, or to correct its charge as given." This exception cannot be sustained. The rule upon this question, as declared in this Court, is as follows:

If a series of propositions are embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions is bad the exception must be overruled.

Union Insurance Co., vs. *Smith*, 124 U. S., 405-424;
Beaver vs. *Taylor*, 43 Ibid., 93;
Worthington vs. *Mason*, 101 Ibid, 149;
United States vs. *Hough*, 103 Ibid, 71.

In order to dispose of this exception, and bring it within the principles of the cases here cited, it is only necessary to satisfy the court that some one of the series of *twenty-one* propositions of law, to which this exception applies, was incorrect, and ought not to have been given to the jury.

The *first* instruction prayed on behalf of the defendant Telfener, was clearly erroneous.

It sought to impeach and destroy the consideration of the contract, by erroneously assuming as a fact, that at the date of the contract, the plaintiff Russ, had done no act towards completing the purchase of said lands, except *to make application* to the surveyor of the county in which they were located, to become the purchaser of them. This instruction ignored the fact that the plaintiff Russ was even then having the lands included in his application to purchase surveyed; and that their survey was completed on the 9th day of November, 1882. If the lands surveyed subsequent to November 1st, 1882, were not within the terms of the contract, it is very clear that all the lands which the plaintiff had applied to purchase, except blocks G, H, I. and J, were within the terms of the contract, because they had not only been applied for, but surveyed previous to the date of the contract. It is absurd to assume, that there was *a partial failure of consideration*, because a

small proportion of the lands applied for were not surveyed until subsequent to the date of the contract. Neither the defendant's pleas, nor his evidence, nor his instructions suggest such a defence. This court for these reasons, and because the said instruction is at variance with the law as decided by this court in the case of Campbell *vs.* Wade, as well as in conflict with the cases of White *vs.* Martin, and in the Jumbo Cattle Company, *supra*, will declare that the said "*first charge*" was properly rejected by the Circuit Court. If this series of instructions which were refused by the Circuit Court could be examined and discussed *seriatim*, it would be clearly shown that none of them should have been given to the jury. It is obvious therefore, that the said exception must be overruled.

Assignments of Error.

The errors assigned are, with the exception of the *first twenty-seventh* and *thirtieth*, based upon the refusal of the Circuit Court to give the instructions requested on behalf of the defendant Telfener, to the charge of the Circuit Court, as given and excepted to in the 20th, 21st, 22nd and 23rd exceptions, and to the admission of the testimony set out in bill of exception No. 6. These exceptions have been heretofore considered, and no further discussion of them is necessary or appropriate here. None of them present any question of law in respect to which any error was committed by the Circuit Court.

The *first* assignment of error is to the refusal of the Circuit Court to grant a continuance upon the

application made on behalf of the defendant Telfener on the 26th of February, 1887. (Record, pp. 24, 25, 26, 27.) No exception to the action of the Circuit Court, in overruling said motion, is reserved or shown in the record. If, however, such exception had been taken, and was shown in the record, the action of the Circuit Court in refusing to grant a continuance could not be reviewed here upon writ of error.

Marine Ins. Co., of Alexandria, vs. *Hodgson*, 6 Cranch, 216, 217.
Sims vs. *Hundley*, 6 How., 1.
Thompson vs. *Selden*, 20 Ibid, 194.

The *twenty-seventh* and *thirtieth* assignments of error are based upon the refusal of the Circuit Court to grant a new trial.

No exception to the action of the Circuit Court in refusing to grant a new trial was reserved at the trial; nor is any such exception shown in the record. And if proper exception to that action by the Circuit Court had been taken and reserved, and shown in the record, this court, upon writ of error, would not be authorized to review the decision of the Circuit Court upon that question.

Blunt vs. *Smith*, 7 Wheat., 248.
Laber vs. *Cooper*, 7 Wall., 569.
Insurance Co. vs. *Barton*, 13 Ibid., 603.
Kerr vs. *Clampitt*, 95 U. S., 188.
Missouri Pacific R. R. Co. vs. *Chicago and Alton R. R. Co.*, 132 Ibid, 191.
Van Stone vs. *Stillwell, Brice & Co.*, 142 Ibid, 128.

The principle declared in all these cases, is strongly stated by Mr. Justice FIELD in *Kerr* vs. *Clampitt* in the following language:

"We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision."

Conclusion.

The importance of this case, as revealed by the magnitude of the amount involved in its determination, has seemed to justify an extended discussion of the questions, which were presented by the exceptions taken at the trial. These exceptions were numerous, and some of them seem to be insignificant and unimportant; because, if it shall be here decided that some of the decisions to which exceptions were reserved, were in law erroneous, it will also be shown by an examination of the record, that none of these errors, could have affected either the verdict of the jury or the judgment rendered thereon. The defences upon which the plaintiff in error relied in the Circuit Court were *non est factum;* and no considera tion for the contract upon which the judgment was rendered.

This court will not reverse the finding of the jury upon the question of fact involved in determining the question of the authority of the agents of the defendant Telfener, to make the contract set out in the plaintiff's declaration. There was evidence submitted to the jury upon that question to which no exception was taken by the defendant Telfener, at the

trial; and this court has no power to determine the question as to the sufficiency or weight of that evidence, if it satisfied the jury upon that question. It is equally true that the mutual promises of the plaintiff Russ, and the defendant Telfener, made to each other and expressed in the terms of the contract set out in the declaration of the plaintiff Russ, were a sufficient consideration to sustain the contract, if the plaintiff Russ, at the time he entered into said contract, had any valuable or vested right that he could assign and transfer to the defendant Telfener. That he had such right, and that it was valuable, is already settled by the decisions of the Supreme Court of the State of Texas, in the cases to which reference has heretofore been made. This court, in deciding upon the existence of that right, will adopt and follow those decisions.

The question of the extent to which the plaintiff Russ, was damaged by the failure of the defendant Telfener to perform said contract, by the payment of the money due under its terms, was determined by the application to its solution of those familiar and elementary principles of the law, which are now so free from question or dispute, that they may be called axioms of the law. This court will neither disregard nor set aside those principles, upon any suggestion of imaginary hardship to the defendant, or out of consideration of courtesy to a distinguished foreigner, who sought a temporary domicil in the hospitable State of Texas for the purpose of making money.

There is no error in the record submitted for the consideration of the court, nor in the judgment rendered by the Circuit Court in favor of the defendant in error. It should therefore be affirmed.

JOHN J. WEED,
Attorney for Defendant in Error.

APPENDIX.

CONTAINING STATUTES OF TEXAS REFERRED TO IN THE FOREGOING BRIEF AND ARGUMENT.

CHAPTER LII.

An act to provide for the sale of a portion of the unappropriated public lands of the State of the State of Texas, and the investment of the proceeds of such sale.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That all the vacant and unappropriated land situated in the following named counties, viz: Nolan, Mitchell, Howard, Martin, Andrews, Gaines, Davidson, (Dawson?,) Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Cordova, Gray, Wheeler, Hemphill, Roberts, Hutchins, Moore, Hartley, Davidson (Dawson?,) Sherman, Hansford, Ochiltree and Lipscomb be and the same is hereby appropriated and set apart for sale, together with the unappropriated lands situated and, being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public lands, situated in organized counties of this State, as contain not more than six hundred and forty acres: provided, that the three million and fifty thousand acres, heretofore appropriated for the building of a State capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the

reservation here made; but any party shall have the same right of acquiring a homestead, within this reservation, under the pre-emption laws of this State, as he may have had prior to the passage of this act.

SEC. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record, and map the field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases.

SEC. 4. Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this act all legal surveyors' fees for work done by them.

SEC. 5. Within sixty days after the return to and filing in office of the the general land surveyor's certificate, map, and field-notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the State treasurer for such purchase money, said commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so surveyed and paid for.

SEC. 6. No tract of land shall be sold under the provisions of this act that contains more than six

hundred and forty acres, and no tract shall have a greater frontage on any running stream or permanent water than one vara per acre for each survey of three hundred and twenty acres or less, and three -fourth of one vara per acre for all other surveys.

SEC. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to surveyors in relation to the surveying of the public lands, under the provisions of this act, as may best subserve the interest of the State, and carry into force and effect the intent and purposes of this act.

SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

SEC. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same, at the rate of fifty cents per acre, within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm, or corporation, who shall pay into the treasury the purchase money therefor.

SEC. 10. One-half of the net proceeds of sales under the provisions of this act shall be and are hereby set apart for the benefit of the public free schools of this State, and the comptroller of public accounts shall, under and by direction of the governor, invest the same in interest-bearing bonds of the State of Texas, or, if said bonds are not to be obtained, then in interest-bearing bonds of the United States, the interest therefrom to be paid into the treasury as part of the available school fund. The balance of the net proceeds of sales under the provisions of this act shall be applied by the proper authorities to the payment and extinguishment of the bonded debt of the

State of Texas as the same becomes due and payable. No surveys shall be made in any of the countries set aside for the State capitol and in which said lands may be selected until after the surveys of the three million and fifty thousand acres set aside for the construction of a new State capitol have been surveyed.

SEC. 11. Whereas, the close of the present session of the legislature is near at hand, an imperative public necessity exists that the constitutional rule requiring this bill to be read on three several days be suspended, and it is therefore so enacted; and whereas the unappropriated lands of the State are being rapidly taken up, a public emergency exists that this act take effect from and after its passage, it is therefore so enacted.

Approved July 14, A. D. 1879.

Takes effect ninety days after adjournment.

CHAPTER XXXIII.

An act to amend sections one and six of "an act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," passed at the special session of the Sixteenth Legislature.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That sections one and six of the above recited act shall hereafter read as follows:

SECTION 1. That all vacant and unappropriated land, situated in the following named counties, viz: Nolan, Mitchell, Howard, Martin, Andrews, Gaines, Dawson, Borden, Scurry, Fischer, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Parmer, Castro, Swisher, Brisco, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Car-

son, Gray, Wheeler, Hemphill, Roberts, Hutchinson, Moore, Hartley, Sherman, Hansford, Ochiltree and Lipscomb be and the same is hereby appropriated and set apart for sale, together with all the unappropriated lands situated and being within and included in the Pacific Reservation, and together with such separate tracts of unappropriated public lands situated in organized counties of this State as contain not more than six hundred and forty acres; provided, that the three million and fifty thousand acres, heretofore appropriated for the building of a State capitol, shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made, but any party shall have the same right of acquiring a homestead within this reservation under the pre-emption laws of this State as he may have had prior to the passage of this act.

"SEC. 6. These lands shall be sold in tracts of six hundred and forty acres each, unless precluded by previous surveys, in which event the purchaser must include all the vacancy, and no tract shall have a greater frontage on any navigable stream or permanent water than one-half the square of such survey, excepting where surrounded by older surveys."

SEC. 2. Whereas the fact that Carson county having been left out of the original law subjecting the vacant lands in said county to location, creates an emergency that this act take effect from and after its passage, and it is so enacted.

Approved March 11, 1881.

Takes effect ninety days after adjournment

CHAPTER III.

An Act Entitled an Act to Withdraw the Public Lands of the State of Texas from Sale.

SECTION 1. Be it enacted by the Legislature of the

State of Texas: That all the public lands heretofore authorized to be sold under the act entitled "An act to provide for the sale of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, be and the same is hereby withdrawn from sale; *Provided*, That nothing contained in this act shall be construed to return the land reserved by an act entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act until the Legislature shall otherwise provide.

SEC. 2. Whereas these lands are being daily sold, to the great detriment of the State, an imperative public necessity exists for the immediate passage of this act, and that the constitutional rule requiring bills to be read on three several days should be suspended and this bill take effect from and after its passage, and it is so enacted.

Approved January 22, at one o'clock and thirty minutes, 1883.

Takes effect from and after its passage.